269

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924~~5~~

No. ~~262~~ 29

THE UNITED STATES, APPELLANT,

vs.

BOSTON INSURANCE COMPANY

APPEAL FROM THE COURT OF CLAIMS

INDEX

24548—24

1 In Court of Claims of the United States

BOSTON INSURANCE COMPANY, (a corporation) *vs.* THE UNITED STATES.	No. B–166

I. *Petition and amended petition*

Filed July 31, 1923

On August 2, 1922, the plaintiff filed its original petition.

Subsequently, to wit, on July 31, 1923, by leave of court, the plaintiff filed its amended petition. Said amended petition is as follows:

AMENDED PETITION

To the Honorable the Court of Claims:

The claimant in the above-entitled cause respectfully represents to this honorable court:

I

The claimant is a corporation duly organized and existing under the laws of the State of Massachusetts, having its principal office in the city of Boston, in said State, and is now and has been continuously engaged since 1908, and long prior thereto, in the business of making and selling fire and marine insurance in the States of Massachusetts, New York, and other States of the United States.

II

The claimant has complied with all the laws of the States of Massachusetts and New York, and the rules and regulations of the respective State insurance departments, prescribing the conditions upon which it was allowed to transact the business of fire and marine insurance within said States during all of the years from 1908 to 1916, inclusive, and continuously thereafter.

III

2 The claimant, because of its transacting the business of insurance within the territory of the United States during the year 1916, became and was subject to the provisions of the act of Congress entitled "An act to increase the revenue, and for other purposes," approved September 8, 1916 (39 U. S. Stat. L. 756), and did in the year 1917 duly file its income tax return for the year 1916, under said act of Congress.

IV

The defendants on May 4, 1917, assuming to act under the provisions of said act of Congress, unlawfully assessed and demanded of claimant an income tax for the year 1916 in the sum of $3,982.00, which claimant paid, involuntarily and under written protest, on June 15, 1917; and defendants did on December 8, 1917, assuming to act under the provisions of the said act of Congress, unlawfully assess and demand of claimant a further additional income tax for the year 1916, in the sum of $16,790.65, which further sum claimant paid, involuntarily and under written protest, on December 18, 1917.

V

On April 30, 1920, claimant duly filed with the Commissioner of Internal Revenue of the United States, in accordance with the statutes in such case made and provided, a claim for the refunding of $20,772.65, for the income tax theretofore claimed to have been illegally collected from it by the defendants for the year 1916.

VI

Claimant's refunding claim was, on January 28, 1922, rejected by the Commissioner of Internal Revenue of the United States in the sum of $8,755.92, the letter of rejection stating, among other things, as follows:

"The only change to be made in the receipts and disbursements basis is relative to losses realized from a sale of capital assets which is shown in the statement below. The return has been adjusted on an accrual basis for the reason that this bureau has recently held that returns of stock, fire and marine insurance companies for 1916 and subsequent years, shall be rendered on an accrual basis, on the ground that such basis is in accordance with the method of accounting regularly employed by such companies, and that such basis clearly reflects the income of stock, fire and marine insurance companies. * * * Your claim will therefore be allowed for $12,016.73 and rejected for $8,755.92, in the next schedule to be approved by the commissioner."

VII

The assessment and collection of that part of the income tax for the year 1916, amounting to $8,755.92, not refunded to claimant under its refunding claim, was unlawful for the following reasons:

(1) Claimant was required by the superintendent of insurance for the State of New York, under appropriate power conferred upon him by statute (Chapter 28 of the Consolidated Laws of New York, and particularly sections 2, 9, 25, and 32), to maintain and did maintain for the years 1915 and 1916, reserve funds covering its unsettled liabilities arising from losses under its policies of insurance outstanding December 31, of each of said years, respectively. The net addi-

tion to such reserve funds required as aforesaid of claimant within the year 1916, and maintained by it, amounted to $560,678.43.

(2) The claimant was entitled to deduct from its gross income, in determining its net income under said act of Congress, approved September 8, 1916 (Section 12. Second. (c)), the net addition, if any, required by law to be made within the year to its reserve funds, the specific language of the statute being as follows:

"in the case of insurance companies, the net addition, if any,
4 required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts."

(3) The defendants, in computing claimant's net taxable income for the year 1916, did not, and unlawfully refused to, deduct from claimant's gross income the net addition required by the order and direction of the superintendent of insurance of the State of New York to be made by claimant during the year 1916, to its reserve funds covering its unsettled liabilities arising from losses under its policies of insurance then outstanding, and unlawfully refused to correct such error when requested to do so in claimant's refunding claim, notwithstanding that in said refunding claim claimant, among other things, specifically requested the deduction from gross income of the net addition to its reserve funds covering "loss claims." ("Loss claims reserves," in insurance parlance, means the reserve maintained under the order of the superintendent of insurance covering unsettled liabilities arising from losses under its policies of insurance.)

(4) The defendants, in computing claimant's net taxable income for the year 1916, deducted from gross income its losses arising under its policies of insurance during the year 1916, exclusive of $14,937.81, the amount of losses which had occurred but had not been reported to the company during said year, but failed and refused to deduct $736,007.91 of the losses paid by claimant under its policies of insurance during said year, notwithstanding that claimant asked in its said refunding claim for the benefit of all deductions from gross income to which it was legally entitled.

VIII

The defendants' failure and refusal to deduct from claim-
ant's gross income for the year 1916 the net addition to its
5 reserve funds required by law and made within the year covering its unsettled liabilities arising from losses under its policies of insurance outstanding December 31, 1916, amounting to $560,678.43, and $736,007.91 paid during said year on account of losses arising under its policies of insurance as heretofore set forth, unlawfully increased claimant's taxable income upon which its income tax was assessed for the year 1916 and unlawfully increased the income tax assessed thereon by defendants and demanded by defendants of claimant and involuntarily paid by the claimant under written protest for the said year, in the sum of $8,755.92.

IX

Claimant further avers that it is and has been the owner of the claim hereinbefore set forth continuously from its inception, and has never sold or assigned the same or any part thereof or interest therein; that claimant is justly entitled to the amounts herein claimed from the United States, after allowing all just credits and off-sets; that claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, or aided or abetted or given encouragement to its enemies, and claimant believes that the facts stated herein are true.

X

Claimant, therefore, prays judgment against the United States for the sum of $8,755.92, and interest thereon from December 18, 1917.

BOSTON INSURANCE COMPANY,
By SERVEN, JOYCE & BARLOW,
Its Attorneys.

By A. R. SERVEN.

6 [Jurat showing the foregoing was duly sworn to by A. R. Serven omitted in printing.]

7 II. *General traverse*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

III. *Argument and submission of case*

On October 17, 1923, this case was argued and submitted on merits by Mr. A. R. Serven, for the plaintiff, and by Messrs. Fred K. Dyar and Forrest D. Siefkin, for the defendant.

8 IV. *Findings of fact, conclusion of law (as amended on the court's own motion Nov. 19, 1923), and opinion of the court by Booth, J.*

Entered Nov. 5, 1923

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

Plaintiff is a corporation duly organized and existing under the laws of Massachusetts, one of the States of the United States, having its principal office in the city of Boston, in said State, and is now and

has been continuously engaged since the year 1908, and long prior thereto, in the business of making and selling fire and marine insurance in the States of Massachusetts, New York, and other States of the United States.

II

Plaintiff duly complied with all of the laws of the State of New York prescribing the conditions upon which it was allowed to transact the business of selling fire and marine insurance within said State, and was issued annual licenses by the superintendent of insurance of the State of New York duly authorizing it to transact its said business of insurance within said State for the respective years of 1915, 1916, and 1917, and plaintiff did transact said business within said State during each of said years.

III

Plaintiff duly filed with the Commissioner of Internal Revenue of the United States its income-tax return for the year 1916, in accordance with the instructions and forms furnished by the said commissioner therefor, and on June 15, 1917, paid the tax assessed thereon in the amount of $3,982, under written protest.

9 IV

On December 8, 1917, defendant assessed against said plaintiff a further additional income tax for the year 1916, in the sum of $16,790.65. This further sum plaintiff paid December 18, 1917, under written protest.

The payment of both of said taxes was made under specific protest, setting out in detail the basis of and reason for such protest.

V

On April 30, 1920, the plaintiff duly filed with the Commissioner of Internal Revenue of the United States, in accordance with the statutes in such case made and provided, claim for the refund of $20,772.65 for the income tax theretofore claimed to have been illegally collected from it by the defendant for the year 1916 in the sums of $3,982 and $16,790.65, respectively. Said claim for refund was allowed for $12,016.73 and rejected for $8,755.92 under date of January 28, 1922.

The items in the schedules of liabilities under the heading "Losses and claims for losses," in the printed reports of the New York State insurance department relating to plaintiff's business for the years 1915, 1916, and 1917, do not include any estimates or allowances for plaintiff's expenses in the adjusting of such outstanding losses.

VI

The failure and refusal of the Commissioner of Internal Revenue to treat as reserve funds required by law the funds held, set aside, and retained by plaintiff in the amount and on account of its liabili-

ties for unsettled loss claims and to deduct from plaintiff's gross income the net addition to such funds during the year 1916, amounting to $560,678.43, resulted in the rejection of $8.755.92 of the amount requested to be refunded in plaintiff's said refunding claim. Plaintiff in this suit is seeking to recover the amount so rejected with accrued interest thereon.

The net addition of $560,678.43 was obtained by deducting the reserve for loss claims plaintiff was required to maintain on December 31, 1915, $775,900.10, as a condition precedent to the transaction of business in the State of New York for 1916 from the reserve fund plaintiff was required to maintain on December 31, 1916, $1,336,578.53, as a condition precedent to the transaction of business in 1917 in the State of New York.

VII

The material provisions of the New York insurance law in effect during the years 1915 and 1916 (Parker's New York Insurance Law) are as follows:

"Sec. 2. The superintendent of insurance

"There shall continue to be a separate and distinct department charged with the execution of the laws relating to insurance, to be known as the insurance department, the chief officer of which shall be the superintendent of insurance, who shall be appointed by the governor, by and with the advice and consent of the senate, and, unless appointed to fill a vacancy, shall hold his office for the term of three years, beginning on the first day of July succeeding his appointment, and ending on the first day of July in the third calendar year thereafter; * * *."

"Sec. 9. Certificate of authorization of superintendent

"No corporation, nor any individual, as principal, shall transact the business of insurance within this state without the certificate of the superintendent of insurance, certifying under his hand and official seal that such corporation or individual has complied with all the requirements of law to be observed by such corporation or individual and that such corporation or individual is authorized to transact the business of insurance specified therein in this state. Such certificate shall be recorded in the office of the superintendent in a book to be kept by him for that purpose. No corporation or individual shall transact in this state any insurance business not specified in the certificate of authority granted by the superintendent. The superintendent may refuse to issue any such certificate to a domestic or foreign corporation, if, in his judgment, such refusal will best promote the interests of the people of the state. Nothing in this section contained shall apply to any insurance company organized prior to the first day of October, eighteen hundred and ninety-two, under any general or special law of this state and

carrying on business on said date, but every such corporation is hereby recognized as an existing corporation and is hereby authorized to continue as such corporation and to continue such business until the legislature shall otherwise provide, subject to such of the provisions of this chapter as are made applicable to such corporations."

"Sec. 25. Jurisdiction of superintendent over foreign corporations

"The superintendent of insurance shall have the same supervision and make the same examination of the business and affairs of every foreign insurance corporation doing business in this state, as of domestic insurance corporations, doing the same kind of business, and of its assets, books, accounts, and general condition. Every such foreign corporation and its agents and officers shall always be subject to and be required to make the same statements and answer the same inquiries and be subject to the same examinations, and, in case of default therein, to the same penalties and liabilities as domestic insurance corporations doing the same kind of business, or any of the agents or officers thereof, are or may be liable to under the laws of this state or the regulations of the insurance department.

"The superintendent may, whenever he deems it necessary, either in person or by a proper person appointed by him, repair to the general office of such foreign corporation, wherever the same may be, and make an investigation and examination of its affairs and condition. He may cancel and revoke the certificate of any such
11 foreign corporation refusing or unreasonably neglecting to comply with the provisions of this section, or to allow the examination herein provided for to be made, and prevents such corporation from further continuance in business in this state.

"A foreign insurance corporation may transact in this state only such kind of business as, under the laws of this state, a like domestic insurance corporation is authorized to transact.

"No such corporation shall transact any business in this state not specified in the certificate of authority granted by the superintendent."

"Sec. 32. Renewal of certificate of authority; revocation

"The certificate of authority granted by the superintendent of insurance, pursuant to the provisions of this chapter, to a foreign insurance corporation to do business in this state, shall not remain in force for longer period than one year, and all such certificates shall expire on the thirtieth day of April of the next year following the date of issue. The statements and evidences of investment required by this chapter to be filed in the office of the superintendent before a certificate of authority is granted to a foreign corporation, shall be renewed from year to year, in such manner and form as the superintendent may require, with an additional statement of the amount of premiums received and losses sustained in this state dur-

ing the preceding year so long as such authority continues. If the superintendent is satisfied that the capital, securities, and investments remain secure, and that it may be safely intrusted with a continuance of its authority to do business, he shall grant a renewal of such certificate of authority. Whenever in the judgment of the superintendent of insurance it will best promote the interests of the people of this state, he may, after a hearing on notice, revoke the certificate of authority of a foreign corporation to do business in this state, prior to its expiration under this section. The action of the superintendent of insurance in revoking the certificate of authority of a foreign corporation shall be subject to review by writ of certiorari."

"Sec. 44. Reports of corporations

"Every corporation, engaged wholly or in part in the transaction of the business of insurance in this state, whether heretofore or hereafter incorporated by a general or special law, shall annually, on the first day of January, or within two months thereafter, if a corporation under article two of this chapter, and on or before the fifteenth day of February, if a corporation under the other articles of this chapter, file in the office of the superintendent of insurance a statement verified by the oath of at least two of the principal officers of such corporation, showing its condition on the thirty-first day of December then next preceding which shall be in such form and shall contain such matters as the superintendent shall prescribe. If a foreign corporation incorporated under the laws of a state or country outside of the United States such oath may be made by the manager thereof within the United States.

12 "Sec. 45. Forms of report to be furnished by superintendent

"The superintendent shall cause to be prepared and furnished to every corporation required by the provision of this chapter to report to him, printed forms of the reports and statements required of such corporations. He may make such changes from time to time in the forms of the same as shall seem to him best adapted to elicit from such corporations a true exhibit of their condition in respect to the several matters which they are required to report, or in respect to any other matters which he may deem material."

"Sec. 118. Allowance of assets and estimation of liabilities upon examinations

"When an examination is made by the authority of the superintendent of insurance into the affairs of any fire insurance corporation doing business in this state, or when such corporation renders a statement to the insurance department, there shall not be allowed as assets any investments which are not held as prescribed by law

at the date of such examination or rendering such statement but unpaid premiums on policies written within three months shall be admitted as available resources. In estimating its liabilities, there shall be charged, in addition to the capital stock and all outstanding claims, a sum equal to the total unearned premiums on the policies in force, calculated on the gross sum without any deduction on any account, charged to the policyholders on each respective risk from the date of the issue of the policy. * * *"

VIII

The superintendent of insurance for the State of New York during the years 1915, 1916, and 1917 required stock, fire, and marine insurance companies, and stock, casualty, surety, and credit insurance companies, as a condition precedent to the transaction of business in the State of New York, to maintain reserves to cover the following liabilities:

"Stock, fire, and marine insurance companies

"A. Loss reserve, including all unpaid losses and estimated expense of investigations and adjustment thereof, less admitted reinsurance.

"B. Reserve for unearned premiums as required by statute and departmental regulations, i. e. (*a*) on fire insurance risks a sum equal to the actual unearned premium on the policies in force calculated on the gross sum without any deduction except for admitted reinsurance, and (*b*) on marine hull risks calculated in the same manner and on marine cargo risks 100 per cent of the last month's gross premium writings.

"C. Reserve for all other outstanding liabilities due or accrued.

"Stock, casualty, surety, and credit insurance companies

"A. Loss reserve, including all unpaid losses and estimated expense of investigation and adjustment thereof, whether on account of compensation and liability insurance or otherwise, less admitted
13 reinsurance, and such additional contingent reserves for losses as may be required by the superintendent of insurance.

"B. Unearned premium or reinsurance reserve calculated as required by statute and all premiums paid in advance at 100 per cent.

"C. Reserve for all other outstanding liabilities due or accrued."

IX

There are no printed publications containing the rules and regulations of the superintendent of insurance for New York State, but there are such rules and regulations kept at the insurance department which are prescribed in forms sent out to and used by insurance companies in their reports.

X

The funds to meet the liabilities of insurance companies were not required by the superintendent of insurance to be kept separate and distinct from other assets of such companies, but such funds were required to be separately specified by book entries as (1) reserves to meet liabilities for unearned premiums and (2) unpaid loss claims and (3) all other outstanding liabilities, due or accrued. All companies were required to have on hand at all times sufficient assets to meet all their liabilities.

XI

The books of the plaintiff company were kept on the written or accrued basis, and its reports to State insurance departments where it carried on business were made on the same basis. Its liabilities were stated separately in such reports and were all designated as liabilities and not as reserves. Plaintiff's returns to the Commissioner of Internal Revenue were made on the cash basis until 1920, when the commissioner, on the authority of section 13 of the act of September 8, 1916, 39 Stat. 771, issued regulations requiring returns to be made on the written or accrued basis beginning with the year 1916, and thereafter plaintiff's returns theretofore filed were amended by officials of the Internal Revenue Bureau so as to conform to the written or accrued basis.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is entitled to recover $8,755.92 with interest. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of eight thousand seven hundred and fifty-five dollars and ninety-two cents ($8,755.92), with interest at the rate of six per cent per annum from December 8, 1917, to November 5, 1923.

OPINION

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff insurance company is a Massachusetts corporation engaged in writing fire and marine insurance. Among other States in which it transacts business is the State of New York, and in order to do so it must comply with the laws of New York relating to a foreign insurance company seeking to write insurance in that
14 State. This the plaintiff did. It acceded to all the requirements exacted of it by the superintendent of insurance and did a large volume of business within that State.

The plaintiff company filed with the Commissioner of Internal Revenue its income-tax return for the year 1916, and on June 15, 1917, paid under protest the tax assessed thereon, amounting to $3,982. Subsequently, on December 8, 1917, the commissioner as-

sessed against the company an additional income tax on the previous return filed of $16,790.65, and on December 18, 1917, this additional tax was paid under protest. On April 30, 1920, plaintiff filed with the commissioner a claim for a refund of the entire sum, viz, $20,772.65, paid as aforesaid, asserting a right thereto under the law. The commissioner refunded $12,016.73 of the tax and rejected the refund claim as to $8,775.92, and it is for the recovery of this sum that the present suit is brought.

The superintendent of insurance of the State of New York exacted of the plaintiff the maintenance of a net addition to its reserve funds of $560,678.43 on account of its liability for unsettled loss claims for the year 1916, and it is stipulated that said sum was duly added by the plaintiff to meet the requirement. The commissioner treated said net addition to reserve funds as income for the calendar year and assessed and collected the sum herein claimed as an income tax lawfully due thereon.

Section 12 of the revenue act of September 8, 1916, 39 Stat. 765, in subsection (c) provides in the following language for a deduction from the gross income of insurance companies organized in the United States, of "the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts." The defendant relied upon the above statute for authority to proceed as it did.

The one question, and the only one properly raised, is whether, within the meaning and intent of the Federal revenue act, the net additions so made by the plaintiff to its reserve funds in pursuance of the requirements of the superintendent of insurance for New York, to cover accrued but unsettled loss claims, may be said to be such a fund as comes within the meaning of "reserve funds," as those terms appear in the revenue act.

The defendant does not dispute that the sum involved was reserved, nor that it was required by the proper insurance authorities of New York to be reserved. Defendant's argument is predicated upon an assertion that Congress in exempting net additions to reserve funds, clearly intended to exempt only such funds as are technically known and universally understood in the insurance world as reserve funds, and as thus understood the terms have a well defined, limited, and certain status and meaning. We may well grant the contention, but apparently it furnishes no solution for the issue, unless we may find some authoritative decision that unsettled loss claims are not within the meaning of "reserve funds," as thus contended for.

Mr. Justice Clarke, in the case of Maryland Casualty Co. v. United States, 251 U. S. 342, 350, defines the terms "reserve" and "reserves," and the definition therein given was elicited by a contention in all respects similar to the one now at issue. "The term 'reserve' or 'reserves' has," he says, "a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or esti-

mated, which, with accretions from interest, is set aside, 'reserved,' as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, but contingent and indefinite as to amount or time of payment." In that case, and following the definition thus announced, the Supreme Court did include a loss claims item as part of the reserve required by law to be maintained by the insurance company.

It is true that the insurance laws of New York did not expressly require that such a reserve be maintained, but the regulations of the superintendent of insurance of that State, in pursuance of a most general and plenary authority so to do, did exact it, and disobedience of the insurance laws precluded the conduct of any insurance business in the State by a foreign insurance company. In the Maryland Casualty Co. case, just cited, the Supreme Court decided that regulations of a department of a State government, adapted to the enforcement of an act of that State, had the force and effect of law.

It is difficult, indeed, in view of the above decision, or upon any other logical hypothesis, to exactly comprehend any reason for excluding loss claims items from a legal reserve under the section of the revenue act heretofore quoted. Congress, of course, intended to tax the net income of the insurance company, and in providing exemptions from its gross income was especially concerned with relieving from the tax burden the sums of money or assets of the company which it was obligated by law to set aside as a guaranty and protection to its policyholders. There was manifestly no difficulty in arriving at fixed expenditures and disbursements actually made by the company, but contingent liabilities, contingent claims and payments of same, an inseparable concomitant of the business itself, was the problem Congress was seeking to solve. If a sum of money had to be set aside and reserved out of gross income to meet a contingent liability it was an act of obvious fairness to treat that sum as exempt from the computations to ascertain net income until the contingency ceased to exist and the liability was discharged. As said in the Maryland Casualty Co. case, supra, when the reserves are released "to free beneficial use of the company in a real, and not a mere bookkeeping sense," they are income.

A loss claims reserve is the setting aside of a sufficient sum or assets of the insurance company to assure the final liquidation of losses not yet reported and to be adjusted. The final payment of a loss depends upon a variety of circumstances. It may be a partial or a total loss; it may involve a contest extending over a long period of time, and many other contingencies may intervene which necessarily require adequate protection for the loser, that in the end his loss, whatever it is, may be made good under the terms of his policy. Assuredly loss claims are to be classified as a liability of the company. For what other purpose are reserves demanded, other than as an assurance against a liability? In this respect the situation is not essentially different from an unearned premium reserve. An insurance company receives a large sum of money as paid premiums upon its policies. When the premiums are paid con-

tingent liability under the policies attach, and the defendant
16 concedes that a reserve of sufficient proportions to cover re-insurance in the event of insolvency is within the meaning and intent of reserves as that term appears in the revenue act. In loss claims there is a distinct contingency as to amount, and in an unearned premium reserve the contingency is as to time, both furnishing protection to the patrons of the company. The technical reserves required under the law do not in every instance furnish permanent immunity from income taxation. This is clearly demonstrated in the Maryland Casualty Co. case, and whatever the result the statute accords the right.

In deciding the oft-quoted Maryland Casualty Co. case the Supreme Court had before it this identical issue, and it was there determined that as to casualty insurance loss claims were clearly within the meaning and intent of Congress when the twelfth section of the revenue act was enacted. It is true this plaintiff is a fire and marine insurance company, but the reason given for the result in the Maryland Casualty Co. case is not made to depend upon the character of the insurance written, and we can not escape the conclusion that the decision is as applicable here as it was under the facts of the case mentioned.

Where a general law covering a particular purpose confides to a supervising official administration thereof, and in pursuance of said law the supervising official issues regulations in keeping with the same, the regulatons so issued have the force of positive law. This has been repeatedly held in numerous decisions of the Supreme Court and made applicable to a department of a State government in the Maryland Casualty Co. case.

The insurance law of the State of New York, applicable, excerpts from which are set out in the findings, does not in any express provision require a reserve for loss claims; neither does it enter into detail with respect to any other character of reserve. Regulations of the superintendent of insurance duly promulgated by him cover the subject, and expressly require a reserve for loss claims, in both fire and casualty insurance. The highest court of New York in 91 N. Y. 385 has construed the law, and by its terms, as thus construed and interpreted, the plaintiff's right to transact business within the State depended absolutely upon its observance of the same. While regulations of the insurance department by designating certain sums as reserves may not thereby entitle a company to the deductions mentioned in the revenue act, and must observe the plain distinction between reserves as understood in insurance business and the general assets of the company, nevertheless we believe it is made quite clear in the Maryland Caualty Co. case that a reserve for loss claims falls within the revenue act, and the plaintiff is entitled to a deduction for the net additions made to this reserve for the year 1916.

Judgment for plaintiff company in the sum of $8,755.92. It is so ordered.

GRAHAM, Judge; HAY, Judge; DOWNEY, Judge, and CAMPBELL, Chief Justice, concur.

17 V. *Judgment*

At a Court of Claims held in the city of Washington on the 5th day of November, A. D. 1923, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of eight thousand seven hundred and fifty-five dollars and ninety-two cents ($8,755.92), with interest at the rate of six per cent per annum from December 8, 1917, to November 5, 1923.

By the Court.

VI. *Defendant's application for appeal*

Filed January 7, 1924

From the judgment rendered in the above-entitled cause on the 5th day of November, 1923, in favor of the claimant, the defendants, by their Attorney General, on the 7th day of January, 1924, make application for, and give notice of, an appeal to the Supreme Court of the United States.

Robert H. Lovett,
Assistant Attorney General.

VII. *Order of court allowing defendant's application for appeal*

Entered January 14, 1924

It is ordered by the court that the defendant's application for appeal be and the same is allowed.

18 In Court of Claims of the United States

[Title omitted.]

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true copies of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Booth, J.; of the judgment of the court; of the defendant's application for appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this seventeenth day of January, A. D. 1924.

[seal]

F. C. Kleinschmidt,
Assistant Clerk, Court of Claims.

c (Indorsement on cover:) File No. 30,071. Court of Claims. Term No. 262. The United States, appellant, vs. Boston Insurance Company. Filed January 21st, 1924. File No. 30,071.

○

No. 28

In the Supreme Court of the United States

October Term, 1945

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 29

THE UNITED STATES, APPELLANT

v.

BOSTON INSURANCE COMPANY

APPEAL FROM THE COURT OF CLAIMS

STIPULATION OF ADDITIONAL FACT OR ALTERNATIVE MOTION TO REMAND TO THE COURT OF CLAIMS FOR FURTHER FINDINGS OF FACT

The parties hereto by their respective counsel represent that—

I

This cause involves the construction and application of the Revenue Act of 1916, Ch. 463, 39 Stat. 765, in respect to the following sections:

> SECTION 10. That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company organized in the United States, no matter how created or organized, but not including partner-

ships, a tax of two per centum upon such income; * * *.

SECTION 12. (a) In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

First. All the ordinary and necessary expenses paid within the year. * * *

Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for exhaustion, wear and tear of property arising out of its use or employment in a business or trade; * * *.

(c) In the case of insurance companies, the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts. * * *

II

The case arose by reason of an adjustment of appellant's tax return for the year 1916, by which the Commissioner of Internal Revenue refused to treat as "Reserve Funds Required by Law" the amounts reported by appellee on account of its liabilities for unsettled loss claims and a consequent refusal of the Commissioner of Internal Revenue

to allow as a deduction from gross income the sum of $560,678.43, constituting the net addition to its liabilities reported by appellee on account of unsettled loss claims.

III

The decision of the Court of Claims, below, holds that this net addition made by the claimant to its so-called "reserve funds" in pursuance of the requirements of the Superintendent of Insurance for New York, to cover unsettled loss claims, constitutes such a fund as to fall within Section 12 (c) above. The appellant contests this decision.

IV

If the decision of the Court of Claims is affirmed, a double deduction in the amount of $560,678.43 from gross income for the year 1916 will have resulted to the appellee.

The Court of Claims' Finding of Fact No. XI is as follows:

> The books of the plaintiff company were kept on the written or accrued basis, and its reports to State insurance departments, where it carried on business, were made on the same basis. Its liabilities were stated separately in such reports and were all designated as liabilities and not as reserves. Plaintiff's returns to the Commissioner of Internal Revenue were made on the cash basis until 1920, when the commissioner, on the authority of section 13 of the act of

September 8, 1916, 39 Stat. 771, issued regulations requiring returns to be made on the written or accrued basis beginning with the year 1916, and thereafter plaintiff's returns theretofore filed were amended by officials of the Internal Revenue Bureau so as to conform to the written or accrued basis.

In the Court below the facts were in part stipulated by the parties. Among the stipulated facts was the following:

> V. On April 30, 1920, claimant duly filed with the Commissioner of Internal Revenue of the United States, in accordance with the statutes in such case made and provided, claim for the refund of $20,772.65 for the income tax theretofore claimed to have been illegally collected from it by the defendants for the year 1916, in the sums of $3,982 and $16,790.65, respectively. A copy of this claim for refund is annexed hereto (marked "Exhibit 6"), and made a part hereof by reference. Said claim for refund was allowed for $12,016.73 and rejected for $8,755.92, under date of January 28, 1922. A copy of letter advising claimant concerning this allowance in part and rejection in part is annexed herewith (marked "Exhibit 7") and made a part hereof by reference. In the adjudication referred to by said letter, the only net addition to reserve funds deducted from gross income in the computation of taxable income was the net addition to unearned premium reserve funds.

> In this adjudication, the accrued policy losses for the year 1916, exclusive of the losses incurred but not reported, were deducted from gross income in arriving at claimant's net income.
>
> The items in the schedules of liabilities under the heading: "Losses and claims for losses," in the printed reports of the New York State Insurance Department relating to claimant's business for the years 1915, 1916, and 1917 do not include any estimates or allowances for claimant's expenses in the adjusting of such outstanding losses.

Both parties below, in their request for Findings of Fact, include stipulated Fact V above.

Wherefore, respective counsel move this Court to accept and consider the facts here stipulated to the same extent as if so found by the Court of Claims, or in the alternative to remand the cause to that court with directions to amend its Findings of Fact XI to conform to this stipulation, and to the common request of the parties below to the end that said Finding XI of the Court of Claims will have added thereto the following sentence:

> In this adjudication, the accrued policy losses for the year 1916, exclusive of the losses incurred but not reported, were deducted from gross income in arriving at the claimant's net income. These accrued policy losses so deducted included losses represented by the sum of $560,678.43, the net addition made by claimant during the

year 1916 to its loss claims reserve fund, as required by the Superintendent of Insurance of the State of New York, which is the amount of deduction here in dispute.

WILLIAM D. MITCHELL,
Solicitor General.

A. R. SERVEN,
Counsel for Appellee.

STATEMENT

The purpose of the foregoing stipulation is to place before this Court a specific finding of fact upon which to rest the appellant's argument that the Congress did not intend, by this act, to allow such double deduction.

While it may be argued that Fact XI as found by the Court of Claims of necessity implies the deduction of claimant's "accrued losses" for 1916, since it states that the tax returns of claimant had been adjusted to conform to the accrued method of accounting, the said Finding XI fails to set out the specific fact which was stipulated and requested by both parties below.

It is represented by the United States that the possible prejudicial effect of the omission of this specific finding of fact in respect to one of appellant's contentions in this cause only now has been appreciated by the appellant. Therefore, unless this Court will accept this stipulation, the remand of this case to the Court of Claims for the purpose of having the specific fact added to the Finding

of Fact XI is deemed necessary to the proper presentation of the Government's cause.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

A. R. SERVEN,
Counsel for Appellee.

SEPTEMBER, 1925.

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INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 29

THE UNITED STATES, APPELLANT

v.

BOSTON INSURANCE COMPANY

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

This is an appeal, pursuant to Section 242 of the Judicial Code, from a judgment of the Court of Claims entered on November 5, 1923. The opinion of that court is reported in 58 Ct. Cls. 603, and is found at page 10 of the record. The application for appeal was filed January 7, 1924, and allowed January 14, 1924. (R. 14.) The judgment awards the appellee, hereinafter called the plaintiff, the sum of $8,755.92, with interest, and was based upon findings of fact made after trial.

The suit was to recover the amount of a tax alleged to have been illegally assessed after claim for refund had been made and rejected.

STATEMENT OF THE CASE

The plaintiff is a fire and marine insurance corporation of Massachusetts. (Finding I, R. 4.)

It was duly authorized to do business in various States, including the State of New York, and the question presented relates to its taxable income for the year 1916.

THE ISSUE

The specific question involved is the right of the plaintiff to deduct from its gross income for the year 1916 the sum of $560,678.43, being the excess of its so-called unsettled loss claims, shown by its report for that year, over the amount shown by its report for the preceding year, and the question arises under Sections 10 and 12 of Title I of the Revenue Act of 1916, ch. 463, 39 Stats. 756, 765, 767.

THE STATUTE

The following are the relevant portions of the statute:

> SEC. 10. That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized but not including partnerships, a tax of two per centum upon such income; * * *
>
> SEC. 12. (a) In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its

income received within the year from all sources—

First. All the ordinary and necessary expenses paid within the year * * *.

Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; * * * (c) in the case of insurance companies, the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: * * *.

The question arises particularly under subdivision (c), which is in all essentials similar to corresponding provisions in the Corporation Excise Tax Law of 1909, Act of August 5, 1909, ch. 6, 36 Stats. 11, 1913, and the Revenue Act of 1913, Act of October 3, 1913, ch. 16, 38 Stats. 114, 166.[1]

[1] The Bill which became the Revenue Act of 1916 was introduced in the House as H. R. No. 16763, 64th Congress, First Session, and contained the provision relating to reserve funds which we are now considering. See Congressional Record, 64th Congress, First Session, Part 11, Vol. 53, p. 10666. The Bill as reported to the Senate did not contain this provision. Senator Sherman called the attention of the Senate to the failure of the Bill as reported to make allowance for the deduction of reserve funds, as provided in the original Bill, and commented vigorously upon this omission. He said:

"Conceive for a moment of the infinite injustice of permitting this provision to stand stricken out. I prefer to think it was an oversight and was inadvertently omitted * * *. What are these net additions to the reserve each year? An elementary knowledge of life

The claim of the plaintiff, which was sustained by the Court of Claims, was that the sum of $560,678.43 was, within the meaning of the Statute, a "net addition required by law to be made within the year to reserve funds," under the Insurance Law of the State of New York. The contention of the Government is that it was not part of the "reserve funds" within the meaning of the Statute. The Court of Claims, in the Sixth Finding (R. 5 and 6), found:

VI

> The failure and refusal of the Commissioner of Internal Revenue to treat as reserve funds required by law the funds held, set aside, and retained by plaintiff in the amount and on account of its liabilities for unsettled loss claims and to deduct from plaintiff's gross income the net addition to such funds during the year 1916, amounting to $560,678.43, resulted in the rejection of $8,755.92 of the amount requested to be

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insurance is all that is necessary, I think, to show the fairness of such an exemption."

He went on to explain the nature of insurance reserves, and said:

"The laws of New York, the laws of Massachusetts, the laws of Pennsylvania, the laws of Ohio, the laws of Illinois, the laws of every state that I ever had an occasion to investigate, require, if I pay, for instance, $35.00 premium on a thousand at my age, a certain proportion of that to be set aside as a reserve. What for? For the guaranty of the performance of the promise to pay my policy when the event happens."

See pages 13091 and 13092, Congressional Record, 64th Congress, First Session, Vol. 53, Part 13. The omitted portion was put back in the Bill by the Conference Committee, being amendment 74, Conference Report No. 1200, and became a part of the Act as finally passed. House Reports, Vol. 3, 64th Congress, First Session, p. 29.

refunded in plaintiff's said refunding claim. Plaintiff in this suit is seeking to recover the amount so rejected with accrued interest thereon.

The net addition of $560,678.43 was obtained by deducting the reserve for loss claims plaintiff was required to maintain on December 31, 1915, $775,900.10, as a condition precedent to the transaction of business in the State of New York for 1916 from the reserve fund plaintiff was required to maintain on December 31, 1916, $1,336,578.53, as a condition precedent to the transaction of business in 1917 in the State of New York.

And in the Eighth Finding (R. 9):

VIII

The superintendent of insurance for the State of New York during the years 1915, 1916, and 1917 required stock, fire, and marine insurance companies, and stock, casualty, surety, and credit insurance companies, as a condition precedent to the transaction of business in the State of New York, to maintain reserves to cover the following liabilities:

"Stock, fire, and marine insurance companies

"A. Loss reserve, including all unpaid losses and estimated expense of investigations and adjustment thereof, less admitted reinsurance.

"B. Reserve for unearned premiums as required by statute and departmental regulations, i. e., (*a*) on fire-insurance risks a sum equal to the actual unearned premium on the policies in force calculated on the gross sum without any deduction except for admitted reinsurance, and (*b*) on marine hull risks calculated in the same manner and on marine cargo risks 100 per cent of the last month's gross premium writings.

"C. Reserve for all other outstanding liabilities due or accrued.

"Stock, casualty, surety, and credit insurance companies

"A. Loss reserve, including all unpaid losses and estimated expense of investigation and adjustment thereof, whether on account of compensation and liability insurance or otherwise, less admitted reinsurance, and such additional contingent reserves for losses as may be required by the superintendent of insurance.

"B. Unearned premium or reinsurance reserve calculated as required by statute and all premiums paid in advance at 100 per cent.

"C. Reserve for all other outstanding liabilities due or accrued."

And in the Tenth Finding (R. 10):

X

The funds to meet the liabilities of insurance companies were not required by the superintendent of insurance to be kept sep-

arate and distinct from other assets of such companies, but such funds were required to be separately specified by book entries as (1) reserves to meet liabilities for unearned premiums and (2) unpaid loss claims and (3) all other outstanding liabilities, due or accrued. All companies were required to have on hand at all times sufficient assets to meet all their liabilities.

THE CONTENTION OF THE UNITED STATES

The claim of the Government is that the so-called loss claims reserve of fire insurance companies is not a "reserve" within the meaning of the Statute or in the commonly accepted meaning of the word, but is a mere liability treated as such by the New York Insurance Law.

SYNOPSIS OF THE ARGUMENT

This case is controlled either by the case of *McCoach* v. *Insurance Company of North America,* 244 U. S. 585, or the case of *Maryland Casualty Company* v. *United States,* 251 U. S. 342.

Both involved the deductibility from gross income of so-called "loss claims reserves" in fixing net income under statutory provisions practically identical with that now under consideration.

In the *McCoach case* the deduction was *not* allowed to a fire and marine insurance company because it was held *not* to be a reserve required by law

In the *Maryland Casualty Company case* the deduction *was* allowed to a casualty insurance company because it was held *to be* a reserve required by law.

The principle which distinguishes the two cases lies in the difference between "reserves" of fire and marine insurance companies and those of casualty companies, a difference recognized by the State Insurance Laws.

The case at bar is a fire and marine insurance case.

The "reserve" to be considered is that required by the New York Insurance Laws to be maintained by fire and marine companies—not casualty companies.

The only reserve required of fire and marine companies by those laws is the "unearned premium reserve."

The fact that the New York statutes require all insurance companies to report all their liabilities, and insists that they be solvent as a condition of doing business in the State, does not change an ordinary liability to a "reserve required by law" within the meaning of the Revenue Act of 1916.

The *Maryland Casualty Company case* did not purport to overrule or question the authority of the *McCoach case*. There is no conflict between them, and upon the authority of the *McCoach case* the judgment of the Court below should be reversed.

ARGUMENT

I

The decision in McCoach v. Insurance Co. of North America, 244 U. S. 585, is controlling upon the issues in this case

The case of *McCoach* v. *Insurance Company of North America,* 244 U. S. 585, was an action brought by a fire and marine insurance company of Pennsylvania, to recover part of an excise tax assessed for the years 1910 and 1911, under the Act of August 5, 1909, ch. 6, Sec. 38, 36 Stats. 11, 112–113.

The only items in dispute before this Court were those representing the tax upon amounts added in each of those years to that part of what were called its "reserve funds," which were held against accrued but unpaid losses, the same issue presented in the case at bar. Section 38 of the Act provided that the net income upon which the tax was based should be ascertained by deducting from the gross income, among other things—

> * * * all losses actually sustained within the year and not compensated by insurance or otherwise * * * and in the case of insurance companies the sums other than dividends paid within the year on policy and annuity contracts *and the net addition, if any, required by law to be made within the year to reserve funds.*

This Court, using italics as above, stated the question to be decided as follows:

> The italics indicate the particular words upon which the controversy turns; the question being whether, within the meaning of the act of Congress, "reserve funds," with annual or occasional additions, are "required by law," in Pennsylvania to be maintained by fire and marine insurance companies, other than the "unearned premium" or "reinsurance reserve" known to the general law of insurance.

The court, proceeding to consider provisions of the Pennsylvania law, Act of June 1, 1911, P. L. 607, 608, found that it created a state insurance commissioner with supervisory control over the companies; provided that he should see that all laws of the commonwealth respecting insurance companies were faithfully executed; authorized him to make examinations; to have access to all the books and papers of any company; to examine witnesses relative to its affairs; to publish the result of his examination; to suspend the entire business of any company during its noncompliance with any provision of law or whenever he should find that its assets were insufficient to justify its continuance in business; and to communicate the facts to the Attorney General whenever he should find any company to be insolvent, fraudulently conducted, or its assets insufficient for carrying on its business. The law required every company to file annual statements with the commissioner upon blank forms to be furnished by him,

such as should seem to him best adapted to elicit a true exhibit of its financial condition.

Sections 7, 8, and 9 of the Pennsylvania Law, set forth in the margin of the report, 244 U. S. 587, 588, made specific provisions for ascertaining the reserve for different classes of companies other than life insurance companies. A previous act, April 4, 1873, P. L. 20, 22, required a specific reinsurance reserve against unexpired risks on fire, marine, and inland policies. The court said:

> The Act of 1911, just quoted, requires the maintenance of a substantially similar reserve; and, with respect to casualty companies and these only, that a reserve be maintained against unpaid losses, based upon the amount of claims presented.

Section 9 of the Act quoted in the margin, 244 U. S. 588, provided that, having charged as a liability—

> * * * reinsurance and loss reserves, as above defined for insurance companies of this Commonwealth other than life, and adding thereto all other debts and claims against the company, the commissioner shall, in case he finds the capital of the company impaired 20 per centum, give notice, etc.

This Court stated that under this legislation and previous statutes in force since 1873 the insurance commissioner had required the plaintiff and similar companies to return each year as an item, among other liabilities, the net amount of unpaid

losses and claims whether actually adjusted, in process of adjustment, or resisted; and although that practice had not been sanctioned by any decision of the Supreme Court of the State, it was relied upon as an administrative interpretation of the law. The court then said:

> Conceding full effect to this, it still does not answer the question whether the amounts required to be held against unpaid losses, in the case of fire and marine insurance companies, are held as "reserves," within the meaning of the Pennsylvania law or of the act of Congress, however they may be designated upon the official forms. As already appears, the Pennsylvania act specifically requires debts and claims of all kinds to be included in the statement of liabilities, and treats them as something distinct from reserves. The object is to exercise abundant caution to maintain the companies in a secure financial position.
>
> The act of Congress, on the other hand, deals with reserves not particularly in their bearing upon the solvency of the company, but as they aid in determining what part of the gross income ought to be treated as net income for purposes of taxation. There is a specific provision for deducting "all losses actually sustained within the year and not compensated by insurance or otherwise." And this is a sufficient indication that losses in immediate contemplation, but not as yet actually sustained, were not intended to be treated as part of the reserve

> funds; that term rather having reference to the funds ordinarily held as against the contingent liability on outstanding policies.
>
> In our opinion the reserve against unpaid losses is not "required by law," in Pennsylvania, within the meaning of the act of Congress.

The analogy between this case and the case at bar is perfect. In each case the company is a fire and marine insurance company. The relevant portions of the Revenue Act of 1916 are similar, practically word for word, to the corresponding provisions of the Excise Tax Act of 1909. The provisions of the insurance law of New York, Chap. 28, Consolidated Laws, relating to the powers of the superintendent of insurance, are practically the same as those of the law of Pennsylvania, referred to by this court, relating to the insurance commissioner of that State. In each case it is his duty to see that the laws of the State with respect to insurance companies are faithfully executed. He is empowered to make examinations; to have access to all the books, papers, etc., of any company; to suspend business of a company if it violates the law; and each company is required to file annual statements upon blanks furnished by him such as shall seem to him best adapted to elicit a true exhibit of its financial condition.

The only reserve required of fire-insurance companies by the New York law is the unearned premium reserve.

As this Court said in the *Maryland Casualty Co. case,* 251 U. S. 342, the term reserve "has a special meaning in the law of insurance." In connection with fire insurance it has been applied ever since the year 1837 to the unearned premium fund (see *Yale Readings on Insurance—Fire,* p. 23), and, so far as we have been able to discover, to that alone. In connection with life insurance it is usually called the "net value" of the policy. (See *Eldrige's Principles of Reservation in their application to Legislative Regulation of Life Insurance.*) In casualty and liability insurance it has a broader meaning, including an amount fixed in a more or less arbitrary way to cover the contingent liability for each suit brought or claim made under each policy.

The New York statute contains specific provisions for estimating the legal reserve for the different kinds of companies. Section 118 of the New York Insurance Law, Ch. 28, Consolidated Laws, provides as follows:

> SEC. 118. *Allowance of assets and estimation of liabilities upon examinations.*— When an examination is made by the authority of the superintendent of insurance into the affairs of any fire insurance corporation doing business in this state, or when such corporation renders a statement

> to the insurance department, there shall not be allowed as assets any investments which are not held as prescribed by law at the date of such examination or rendering such statement; but unpaid premiums on policies written within three months shall be admitted as available resources. In estimating its liabilities, there shall be charged, in addition to the capital stock and all outstanding claims, a sum equal to the total unearned premiums on the policies in force, calculated on the gross sum without any deduction on any account, charged to the policyholder on each respective risk from the date of the issue of the policy.

It is to be observed that by this section, whenever an examination is made or a report rendered, in estimating liabilities there shall be included (1) capital stock, (2) all outstanding claims, and (3) a sum equal to unearned premiums, that is, the "reserve."

Article II of the New York Insurance Law deals with life, health, and casualty insurance corporations, and Section 86, a part of that article, provides for ascertaining the assets and liabilities of life and casualty insurance corporations. Under this section, in estimating the condition of a life insurance corporation, there shall be charged as liabilities—

> * * * in addition to the capital stock, all outstanding indebtedness of the corporation, and the premium reserve on policies,

> and additions thereto in force, computed according to the table of mortality and rate of interest prescribed in this article.

A preceding section, Section 84, prescribes in detail the method of "valuation" of life-insurance policies, that is, of computing the "premium reserve."

Section 86, prior to 1917, provided that in estimating the condition of any casualty insurance company there shall be charged as liabilities—

> * * * in addition to the capital stock, all outstanding indebtedness of the corporation, and the premium reserve on policies in force, equal to the unearned portions of the gross premiums charged for covering the risks, computed on each respective risk from the date of the issuance of the policy.

And further provides for computing the "indebtedness for outstanding losses" from accidents under Employers' Liability and General Liability clauses. These provisions are long and complicated, but they may be summarized by saying that they are based upon the ratio between losses and premiums, as shown by experience extending over a number of years.

Section 86 of the Insurance Law, as amended by chapter 298 of the laws of 1917, required that in estimating the condition of any casualty or surety insurance corporation there should be charged as liabilities, in addition to the capital stock:

> A. The premium reserve on policies in force, equal to the unearned portions of the gross premiums charged for covering the risks, computed on each respective risk from the date of the issuance of the policy.
>
> B. The reserve for outstanding losses under insurance against loss or damage from accident to or injuries suffered by an employee or other person and for which the insured is liable, computed as follows: * * *

Then follow specific directions for the computation of reserves; for instance, a reserve of $1,500 for each suit being defended under a policy written ten years prior to the date as of which the statement is made; $1,000 for each suit under a policy written five and not more than ten years prior, etc. Then follow directions as to compensation claims and the allocation of losses between different years. Finally it was provided:

> Whenever, in the judgment of the superintendent of insurance, the liability or compensation loss reserves of any insurer under his supervision, calculated in accordance with the foregoing provisions, are inadequate, he may, in his discretion, require such insurer to maintain additional reserves based upon estimated individual claims or otherwise.

Casualty companies, therefore, in addition to the unearned premium reserve, must maintain under their employees' and general liability poli-

cies a "loss-claims reserve," fixed arbitrarily by statute; and furthermore, if that reserve is, in the opinion of the Superintendent of Insurance, inadequate, he is empowered to require of any such company additional reserves. *He is given no power whatever to require a fire insurance company to maintain any reserve except the unearned premium reserve fixed by Section 118 of the Insurance Law.*

Indeed, he has no power to require them to report as liabilities any except the three enumerated in Section 118, capital stock, outstanding claims, and unearned premiums. (*Reports of the Attorney General of New York,* 1904, p. 413.) In that opinion the Attorney General of New York advised the superintendent of insurance with respect to the status of guaranty surplus funds and special reserve funds, under Sections 130, 131, and 132 of the Insurance Law, and particularly as to whether these funds should be reported under liabilities of the company. The sections of the Insurance Law referred to permitted companies to exercise an option to accumulate certain special funds the object of which was to provide additional security against extensive conflagrations.

The companies objected to being required to report these funds as liabilities, because the item designated in their reports as "surplus over all liabilities" was thereby reduced by an amount equal to the sum of these funds, and as the item

"surplus over all liabilities" was the principal item by which the financial strength of the corporation was estimated, the statement was unfair to the companies. It is obvious that under such circumstances a company maintaining this special fund would be in no better apparent condition than would a company which did not maintain it. The Attorney General recommended a modification of the ruling of the superintendent. In the course of his opinion the Attorney General said:

> Section 118 of the Insurance Law directs that in estimating the liabilities of the fire insurance corporation "there shall be charged, in addition to the capital stock and all outstanding claims, a sum equal to the total unearned premiums on the policies in force." The three items thus specified are all the items required by law to be enumerated and charged as liabilities, namely, capital stock, outstanding claims, and unearned premiums.

The portions of Section 118 of the Insurance Law quoted by the Attorney General is the same as was in force at the time of the transactions now being considered.

This "unearned premium reserve" is a trust fund, to be used only for purposes of reinsurance, or to be returned to the policyholder in case the company becomes insolvent. (*Reports of the Attorney General* of New York, 1906, page 558.) In that opinion, rendered by the Attorney General to the Superintendent of Insurance on December

19, 1906, he answered the three following questions in the affirmative:

> First. Is the receiver of an insolvent fire insurance company justified in using the unearned premium fund for the purposes of reinsurance or of restoring to the policyholders the unearned premium upon cancellation of their outstanding policies?
>
> Second. Are the policyholders in fire insurance companies preferred creditors to the extent of the unearned premiums upon their several uncanceled policies?
>
> Third. If the policyholders are preferred creditors to the extent of the unearned premiums, and a contract of reinsurance would simply cover the unearned premium fund, would the corporation still have the right, in contemplation of insolvency, to turn over that unearned premium fund in consideration of the reinsurance?

In reaching this conclusion he stated that in his opinion (p. 559):

> * * * the unearned premiums in the hands of the company thus paid in advance by the policyholder become in the hands of the company a trust fund, so far as the unearned portion is concerned, for the purpose of protecting the policyholder, either by reason of reinsurance or returning to him, the unearned premium. The company would have no right to use this unearned premium in the discharge of its other obligations to the detriment of the policy-

> holder, who has thus deposited it with the company.

Is it not plain, therefore, that with respect to fire insurance companies the only item treated as a reserve is the item of unearned premiums? All other obligations of the company, in addition to the capital stock, are considered "outstanding claims," though, for administrative purposes and in order to reflect the true condition of the company, the superintendent requires various kinds of outstanding claims to be divided and separately reported. It is obvious that the superintendent in passing upon the condition of a company and the manner in which it is conducting its business, should know the nature of its outstanding obligations, particularly the extent to which it is allowing its losses to remain unpaid.

The analogy to the *McCoach case* seems to be perfect. As this Court said in that case:

> The Pennsylvania act specifically requires debts and claims of all kinds to be included in the statement of liabilities and treats them as something distinct from reserves.

And that they could not be treated as reserves within the meaning of the Pennsylvania Law or of the Act of Congress, "however they may be designated upon the official forms." The amount of outstanding claims is in no sense a *reserve* required by law or departmental regulation. It is a *fact* with respect to an existing liability, not a re-

serve against the contingencies of the future, the term "reserve," as was said by this Court in the *McCoach case,* "having reference to the funds ordinarily held as against the contingent liability on outstanding policies."

II

The case of Maryland Casualty Co. v. The United States, 251 U. S. 342, does not control this case

The case of *Maryland Casualty Company* v. *The United States,* 251 U. S. 342, was an appeal from the Court of Claims. The suit was to recover certain taxes assessed under the Corporation Excise Tax Act of 1909, and the Income Tax Act of October 3, 1913, ch. 16, 38 Stats. 114, 166. The claimant was engaged in casualty, liability, fidelity, guaranty, and surety insurance. The larger part of its business was employers' liability, accident, and workmen's compensation insurance. Three questions were considered by this Court, but only one of them is relevant to the present discussion. That question was stated by the court as follows:

> May the amount of gross income of the claimant be reduced by the aggregate amount of the taxes, salaries, brokerage, and reinsurance unpaid at the end of each year, under the provisions in both the excise and income tax laws allowing deductions of "net addition, if any, required by law to be made within the year to reserve funds?"

The claimant in its returns treated as reserves the following items: "Reserve for unearned premiums," "special reserve for unpaid liability losses," and "loss claims reserve."

This Court said:

> Unearned premium reserve and special reserve for unpaid liability losses are familiar types of insurance reserves, and the Government, in its amended returns, allowed these two items, but rejected the third, "Loss claims reserve."
>
> The Court of Claims, somewhat obscurely, held that the third item should also be allowed. This "Loss claims reserve" was intended to provide for the liquidation of claims for unsettled losses (other than those provided for by the reserve for liability losses) which had accrued at the end of the tax year for which the return was made and the reserve computed. The finding that the Insurance Department of Pennsylvania, pursuant to statute, has at all times since and including 1909 required claimant to keep on hand, as a condition of doing business in that State, "assets as reserves sufficient to cover outstanding losses," justifies the deduction of this reserve as one required by law to be maintained, and the holding that it should have been allowed for all of the years involved is approved.

The specific finding of the Court of Claims, as shown by the record on file in this court, Finding XII, page 27 of the record, is as follows:

XII

The insurance department of the State of Pennsylvania, in which claimant does business, in pursuance of the act of 1873 (P. L. 20), and the act of May 1, 1876 (P. L. 53), the act of June 1, 1911 (P. L. 607) [Statutes of Pennsylvania], the latter act making no change in the department's rulings but more specifically defining them, has at all times since 1909, inclusive, required claimant to keep on hand, as a condition to its doing business in Pennsylvania, assets as reserves sufficient to cover outstanding losses, unearned premiums, and all other claims against the company, whether due or accrued.

The insurance department of the State of New York, in which claimant does business, made in pursuance of sections 86, 41, 39, 44, 45, 48 of the New York insurance laws of 1907, has at all times since 1909, inclusive, required claimant to maintain reserve funds sufficient in amount and satisfactory in kind to meet all of its accrued, but unpaid, indebtedness.

The insurance department of the State of Massachusetts in which claimant does business, in pursuance of section 87, chapter 576, acts of 1906, Massachusetts insurance laws, has at all times since 1909, inclusive, required claimant to hold or reserve assets for the payment of all claims and obligations against it.

> The insurance department of the State of Wisconsin in which claimant does business, in pursuance of section 1966–47 of the Wisconsin statutes of 1898, which authorize the commissioner of insurance in computing the reserve liability of casualty companies to make such computations as in his judgment are equitable and just to both policyholder and the company, has always since 1909, inclusive, required claimant to carry sufficient reserves to cover all of its outstanding liabilities, as set forth in its annual State reports.

It is to be observed that this Finding, with respect to the requirement of the Pennsylvania Insurance Department, is based upon the same statutes considered by this Court in the *McCoach case,* in which it was held that reserve funds held against accrued but unpaid losses in the case of *fire and marine insurance* companies under the Pennsylvania law, were not deductible under the Federal statute. In reaching that conclusion this Court pointed out that it was with respect to *casualty* companies only that the statute required a reserve against unpaid losses.

The Finding with respect to the requirements of the New York Insurance Department regarding *casualty* companies was that it required claimant to maintain reserve funds to meet "all of its accrued but unpaid indebtedness."

The Finding with respect to the Insurance Department of Massachusetts was that it required

claimant to hold or reserve assets for the payment of "all claims and obligations against it," and with respect to the requirements of the Wisconsin Department, that it authorized the commissioner of insurance in computing the reserve liability of *casualty* companies, "to make such computations as in his judgment are equitable and just," and that he has "required claimant to carry sufficient reserves to cover all of its outstanding liabilities."

With respect to the claims under the rulings of the insurance departments of Pennsylvania, New York, and Wisconsin, however, and the contention of the claimant that it was required to provide reserves for the payment of the rejected items of liability, this Court said:

> Whether this contention of the claimant can be justified or not depends upon the meaning which is to be given to the words "reserve funds" in the two acts of Congress we are considering.
>
> The term "reserve" or "reserves" has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside, "reserved," as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.

In this case, as we have seen, the term includes "unearned premium reserve" to meet future liabilities on policies, "liability reserve" to satisfy claims, indefinite in amount and as to time of payment, but accrued on liability and workmen's compensation policies, and "reserve for loss claims" accrued on policies other than those provided for in the "liability reserve," but it has nowhere been held that "reserve," in this technical sense, must be maintained to provide for the ordinary running expenses of a business, definite in amount, and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, reinsurance, and unpaid brokerage.

The requirements relied upon, of the Insurance Departments of New York, Pennsylvania, and Wisconsin, that "assets as reserves" must be maintained to cover "all claims," "all indebtedness," "all outstanding liabilities," in terms might include the rejected items we are considering; but plainly the departments, in these expressions, used the word "reserves" in a non-technical sense as equivalent to "assets," as is illustrated by the Massachusetts requirement that each company shall "hold or reserve assets" for the payment of all claims and obligations. The distinction between the "reserves" and general assets of a company is obvious and familiar, and runs through the statements of claimant and every other insurance company.

From this the conclusion is plain that the Act of Congress permitting a deduction of a reserve "required by law" applies only to such reserve as "has a special meaning in the law of insurance"; that the Pennsylvania statute requires casualty companies to maintain such a "loss claims reserve," but that the laws of Pennsylvania and the other states, including New York, though requiring assets as reserves, or "reserve funds," to be kept sufficient to cover all outstanding obligations of the company, do not permit deduction to be made under the Federal Statute except to the extent to which these funds are properly and actually "reserves," within the meaning of the insurance term, no matter how they may be described in the forms upon which reports are made.

Considered in the light of the distinction between the business of fire insurance companies and casualty companies, and the difference in the laws respecting the reserves of these companies, there is no inconsistency between the *McCoach case* and the *Maryland Casualty Company case,* and there is nothing in the opinion in the *Maryland Casualty case* to indicate that the Court intended to overrule or question the authority of the *McCoach case.* The loss claims reserve of a *fire* insurance company is not deductible under the Federal law, because it is not a reserve in the ordinary sense of the word and is not so treated in the

State Insurance Laws. The loss claims reserve of a *casualty* company, however, is deductible because it is in fact a reserve in the ordinary sense of the word and is so recognized by the State Insurance Laws.

III

The judgment appealed from will result in the allowance to the appellee of a double deduction

From Finding XI of the Court of Claims, page 10, it appears that the books of the plaintiff were kept on the written or accrued basis, and its reports to State insurance departments were made on the same basis. Plaintiff's returns to the Commissioner of Internal Revenue were made on a cash basis until 1920, when the Commissioner, on the authority of Section 13 (d) of the Revenue Act of September 8, 1916, c. 463, 39 Stats. 756, 771, required returns to be made on the written or accrued basis beginning with the year 1916, and thereafter plaintiff's returns theretofore filed were amended by the Internal Revenue Bureau so as to conform to the written or accrued basis. From this the inference might fairly be drawn that the losses actually accrued during the year, represented by these so-called "reserves," and liabilities accrued on policy and annuity contracts have been allowed. However, as that result does not appear with absolute definiteness the parties have filed a stipulation that a certain fact may be considered by the court,

which fact was stipulated by them in the court below and which both parties asked the Court of Claims to find. The stipulation is that there be added to Finding XI of the Court of Claims the following:

> In this adjudication, the accrued policy losses for the year 1916, exclusive of the losses incurred but not reported, were deducted from gross income in arriving at the claimant's net income. These accrued policy losses so deducted included losses represented by the sum of $560,678.43, the net addition made by claimant during the year 1916 to its loss claims reserve fund as required by the Superintendent of Insurance of the State of New York, which is the amount of deduction here in dispute.

Should this court be willing to consider this fact thus stipulated by the parties it is, we think, apparent that the affirmance of this judgment will result in allowing to the plaintiff the deduction of the same sum twice, once on the theory of a reserve and once upon the theory of an accrued loss. Should the court be unwilling to accept the stipulation, then the parties have in the alternative moved to remand the case to the Court of Claims for the purpose of having the fact found.

It must be remembered that the Revenue Act of 1913 did not permit corporations to render a return upon an accrual basis. Section 13(d) of the Revenue Act of 1916 changed this by permit-

ting returns to be made upon that basis. When insurance companies kept their books and filed their statements with insurance departments upon an accrual basis, but reported their incomes to the Internal Revenue Department upon a cash basis, it is easy to see that a certain amount of inconsistency would necessarily result, and, as suggested by this court in the *Maryland Casualty Company case,* it is not difficult to suggest conditions under which, by the terms of the statute itself, a double deduction might properly follow. When the law was changed, however, so as to permit corporations to file returns upon an accrual basis and thereby obtain a deduction for all losses sustained but unpaid, it is inconceivable that Congress under such conditions intended to allow a deduction both for the loss sustained and amount "reserved" on account of that loss.

CONCLUSION

THE JUDGMENT OF THE COURT OF CLAIMS SHOULD BE REVERSED.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

SEPTEMBER, 1925.

In the Supreme Court of the United States

October Term, 1925

No. 29

The United States, Appellant

v.

Boston Insurance Company

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE APPELLEE

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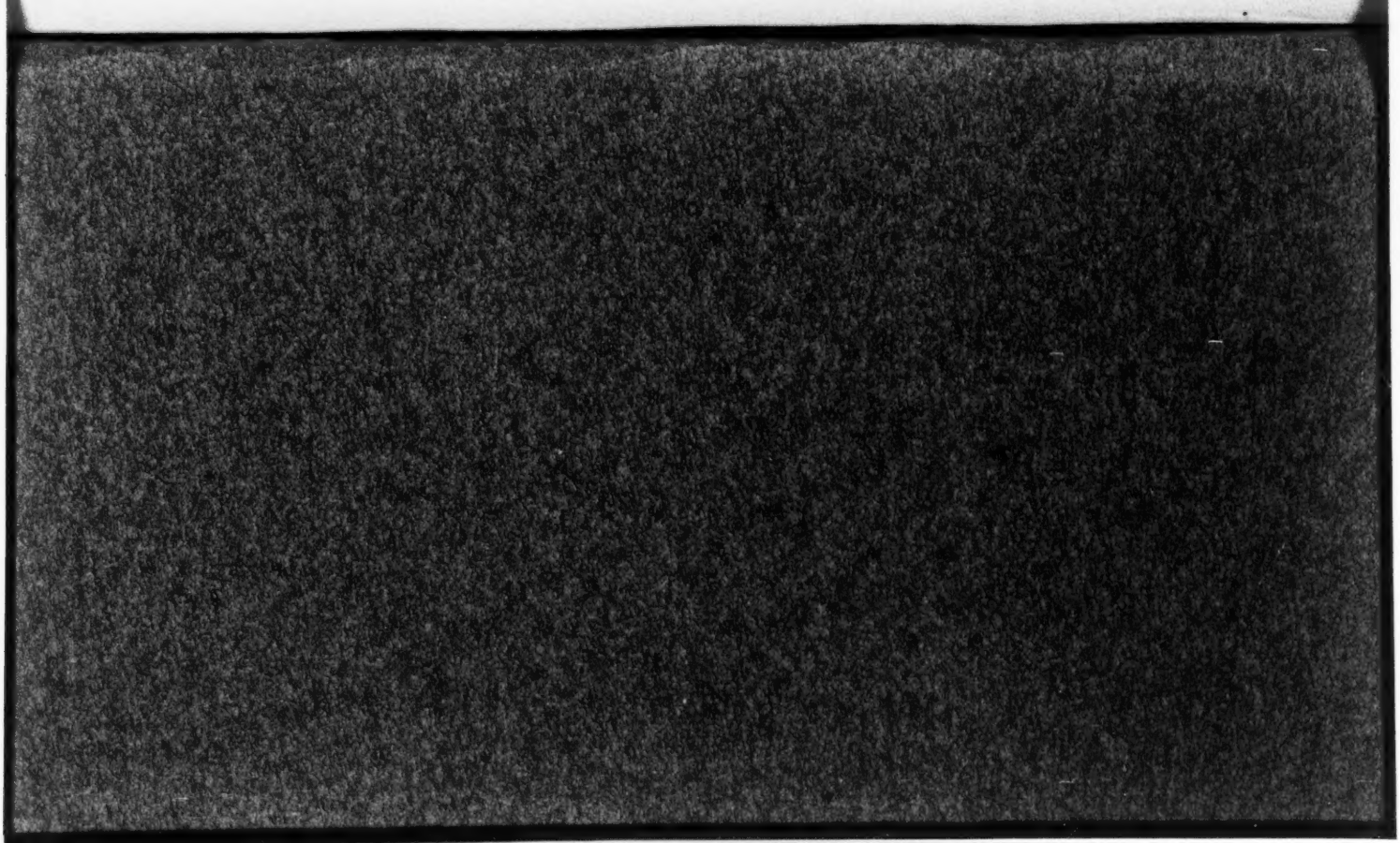

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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 29

THE UNITED STATES, APPELLANT

v.

BOSTON INSURANCE COMPANY

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE APPELLEE

This is an appeal from a judgment of the Court of Claims. The opinion of that court is reported in 58 Ct. Cls. 603, and is found at page 10 of the record.

This appeal is taken under Section 242 of the Judicial Code from a judgment of the Court of Claims for $8,755.92, with accrued interest thereon at six per centum per annum from December 8, 1917, to November 5, 1923, entered on November 5, 1923, in favor of appellee, (R. 14), hereinafter called the plaintiff.

STATEMENT OF THE CASE

Plaintiff is a Massachusetts stock fire and marine insurance company, which, during the years 1915, 1916 and 1917 transacted its business of making and selling insurance in Massachusetts, and elsewhere, including the State of New York (Finding I, R. 4), where it transacted its said business under the authority of the certificates, or licenses, of the Superintendent of Insurance of said State. (Finding II, R. 5.) On its business of the year 1916,

plaintiff paid, under written protest, Federal income taxes of $3,982.00 on June 15, 1917, and $16,790.65 on December 18, 1917. (Findings III-IV, R. 6.)

On April 30, 1920, plaintiff filed its refunding claim with the Commissioner of Internal Revenue for $20,772.65, on account of the income taxes so paid by it on the business of 1916, which, on January 28, 1922, was adjudicated on the accrued and incurred basis and was allowed for $12,016.73 and rejected for $8,755.92 (Findings V, XI, R. 5, 10). Thereupon plaintiff brought suit in the Court of Claims for the amount so rejected, with accrued interest thereon, on the ground that it was entitled to have the net additions made within the year 1916 to its policy loss claims reserve funds, amounting to $560,678.43, as required by the Superintendent of Insurance of the State of New York deducted from gross income in the computation of its net or taxable income. (Finding V, R. 5–6.)

The New York Insurance Law invested the Superintendent of Insurance for that State with authority (Finding VII, R. 6–9) to require, and he did require, plaintiff to maintain reserve funds covering its unsettled policy loss claims as a condition precedent to the transaction of its business in said State during the years 1915, 1916 and 1917. (Finding VIII, R. 9.)

The Court of Claims entered judgment for plaintiff on November 5, 1923, and this appeal was allowed on January 14, 1924. (R. 14.)

THE ISSUE

The question involved in this appeal is whether the plaintiff, in addition to the deductions previously allowed, is also entitled to have the net additions made to its loss claims reserve funds within the year 1916, as required by the Superintendent of Insurance for the State of New York amounting to $560,678.43, deducted from its gross income in the computation of its net or taxable income for

that year, in accordance with the provisions of Sections 10 and 12 of the 1916 Revenue Act (39 Stat. L. 756, 765, 767).

THE STATUTE

The material provisions of said Sections are as follows:

> Sec. 10. That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized but not including partnerships, a tax of two per centum upon such income; * * *.
>
> Sec. 12. (a) In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—
>
> First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity.
>
> Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; * * * and (c) in the case of insurance companies, the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: * * *.
>
> Third. The amount of interest paid within the year on its indebtedness * * *.
>
> Fourth. Taxes paid within the year * * *.

If plaintiff's net additions to its loss claims reserve funds within the year 1916, as required by the Superin-

tendent of Insurance for the State of New York, come within the provisions of subdivision (c), Par. Second of said Section 12, then this question must be answered in the affirmative.

SYNOPSIS OF THE ARGUMENT

The New York Insurance Law invests the Superintendent of Insurance with ample authority to make such requirements as he deems best suited to promote the interests of the people of the State, as a prerequisite to granting or renewing the authority of foreign insurance companies to transact business in that State. The Superintendent of Insurance has exercised this authority by requiring, among others, that such an insurance company shall maintain reserve funds covering its policy loss claims. This requirement is made under appropriate authority of law and, therefore, has the full force and effect of law. The net additions plaintiff was required by the Superintendent of Insurance of the State of New York to make to its loss claims reserve funds during the year 1916 were required by law. The highest court of the State of New York has confirmed the authority of the New York Superintendent of Insurance under which these reserves were required. Plaintiff is, therefore, entitled as a matter of law to have such net additions deducted from its gross income in the computation of its net or taxable income for said year. The case of McCoach *v.* Insurance Company of North America does not control the decision of this case, because the Insurance Commissioner of Pennsylvania is not invested with discretionary power in granting or withholding certificates of authority to transact business in that State, and for other material differences between the New York and Pennsylvania insurance laws. The appellant, hereinafter referred to as the defendant, objects to the deduction of the net addition to loss claims reserves, on the ground that it results in a

double deduction. The clause of the statute providing for this deduction, and also for the deduction of the amounts other than dividends paid to policy holders, is clear and positive and contains no restrictions or limitations whatever upon either of said deductions. Each of these deductions is entirely separate and independent of the other. Therefore, plaintiff is entitled to the allowance of each of these deductions. The court interpretation of taxing acts justifies the allowance of this deduction.

ARGUMENT.

I.

Plaintiff is a Massachusetts corporation which has transacted its business in the State of New York continuously since 1908, and long prior thereto. It is a foreign insurance company within the meaning of Section 56 of the New York Insurance Law, Chapter 28 of the Consolidated Laws of New York and amendments thereto, hereafter called the Insurance Law. Sections 2, 9, 25, 32, 44, 45, and 118 of the Insurance Law are contained in Finding V herein (R. 6-9).

Requirements of Superintendent.

Sec. 2 provides in part as follows:

> There shall continue to be a separate and distinct department charged with the execution of the laws relating to insurance, to be known as the insurance department, the chief officer of which shall be the superintendent of insurance, * * *.

Sec. 9, regarding certificates of authority or licenses to do business in that State, provides in part as follows:

> The superintendent may refuse to issue any such certificate to a domestic or foreign corporation, if, in his judgment, such refusal will best promote the interests of the people of the state.

The following extract from Section 25 recognizes the regulations of the insurance department as having the full force and effect of law:

> Every such foreign corporation and its agents and officers shall always be subject to and be required to make the same statements and answer the same inquiries and be subject to the same examinations, and, in case of default therein, to the same penalties and liabilities as domestic insurance corporations doing the same kind of business, or any of the agents or officers thereof, are or may be liable to under the laws of this state or the regulations of the insurance department.

Sec. 32, regarding the renewal or revocation of certificates of authority of foreign insurance companies, provides in part as follows:

> If the superintendent is satisfied that the capital, securities, and investments remain secure, and that it may be safely intrusted with a continuance of its authority to do business, he shall grant a renewal of such certificate of authority. Whenever in the judgment of the superintendent of insurance it will best promote the interests of the people of this state, he may, after a hearing on notice, revoke the certificate of authority of a foreign corporation to do business in this state, prior to its expiration under this section.

Certainly no more appropriate language could have been employed by the legislature to invest the Superintendent of Insurance with the broadest authority to fix the requirements of an insurance company as a condition precedent to the granting, withholding, renewing, or revoking its certificate of authority to transact its business in said State.

In the exercise of the authority so vested in him by the Insurance Law, the Superintendent of Insurance, by his regulations, required plaintiff to maintain reserve funds

during the years 1915, 1916 and 1917, covering, among others, its unsettled policy loss claims as a condition precedent to the continued transaction of its business in the State of New York. (Finding VIII, R. 9.)

It should here be noted that unearned premiums and policy loss claims constitute the only contractual obligations of plaintiff's contracts of insurance which may require payments of money to its policy holders.

The Superintendent of Insurance did not require the funds reserved on account of plaintiff's loss claims to be kept separate and distinct from its other assets, but did require such funds to be separately specified on plaintiff's books as reserves for unpaid loss claims (Finding X, R. 10).

The regulations under which these requirements were made were in pursuance of appropriate authority of law and not in conflict therewith. It must certainly be admitted that the requirement to maintain reserve funds to cover unsettled loss claims is well adapted to safeguard and "best promote the interests of the people of the State." It would be a strange condition indeed if a reserve was required to protect the interests of policy holders in the unearned portions of the premiums paid by them, amounting to but a few dollars for each policy holder, while no reserve was required to make certain the payment to them of the losses arising under their policies, averaging a far greater amount per loss. It is this situation which has justified the Superintendent's requirement of loss claims reserve funds, in order to best promote the interests of the people of the State. The primary reason for the requirement of insurance reserves is to better protect and safeguard the interests of the policy holders. It was early recognized by the law makers that the individual policy holder was practically helpless in the hands of an unscrupulous insurance company. Therefore, provision was made by the State to require all the reserve funds that might

be necessary to fully safeguard and protect the public in its dealings with insurance companies. This Court has many times affirmed the doctrine of the right of the State to prescribe the conditions under which foreign corporations can transact their business within its borders. See Hooper *v.* California, 155 U. S. 648; 39 L. Ed. 297; The Waters Pierce Oil Co. *v.* Texas, 177 U. S. 28; 44 L. ed. 657; German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389, 59 L. ed. 1011, and the cases cited in these opinions. In the Maryland Casualty Company *v.* United States, 251 U. S. 342; 64 L. ed. 297, this Court held:

> It is settled by many recent decisions of this court that a regulation by department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. United States *v.* Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Supt. Ct. Rep. 480; United States *v.* Birdsall, 233 U. S. 223, 231, 58 L. ed. 930, 934, 34 Sup. Ct. Rep. 512; United States *v.* Smull, 236 U. S. 405, 409, 411, 59 L. ed. 641–643, 35 Sup. Ct. Rep. 349; United States *v.* Morehead, 243 U. S. 607, 61 L. ed. 926, 37 Sup. Ct. Rep. 458. The law is not different with respect to the rules and regulations of a department of a state government.

See also Davis *v.* Mass. 167 U. S. 533, 41 L. ed. 813.

The court reports of every State contain many opinions giving legal effect to regulations issued under appropriate authority of law by various State, county and municipal departments, boards and commissions. Perhaps the most familiar of these relate to regulations or ordinances concerning police, fire, water, health and building departments of municipalities, but the underlying principle of all of them is the same as for the regulations of a State or Federal department. Where they have been made in pursuance of appropriate authority of law and are not

arbitrary or oppressive, the courts have given them the full force and effect of law. See People ex rel. Doscher *v.* Sisson, 222 N. Y. 387, in which the court says:

> The order of the State Commissioner made pursuant to and within valid statutory authority is to be considered as the act of the state, and in connection with the statutes has the vigor and effect of a statute. (People ex rel Knoblauch *v.* Warden, etc., 216 N. Y. 154; Matter of Stubbe *v.* Adamson, 220 N. Y. 459.)

See also Saratoga Springs, *v.* Saratoga Gas Co., 191 N. Y. 123; Mutual Film Corporation *v.* Ohio Ind. Com., 236 U. S. 230; 59 L. ed. 522; Red "C." Oil Manufacturing Co. *v.* Board of Agriculture, 222 U. S. 380, 56 L. ed. 240.

SUPERINTENDENT'S POWER AFFIRMED BY HIGHEST COURT OF STATE.

The power of the Superintendent of Insurance, under the New York statutes, to exercise his discretion in declining to issue a certificate of authority to transact business in the State of New York, has been affirmed by the New York courts. In People ex rel. Hartford L. & A. Insurance Co. *v.* Fairman, 12 Abbott's N. Y., 252, the facts and holding of the court were in substance as follows: The relator at one time had a certificate allowing it to sell insurance in the State of New York. Its license was threatened to be revoked by the Superintendent, and the relator thereupon changed its name, and applied for a certificate to do business in the State of New York under the new name. The court held, page 259:

> If, on the other hand, this relator having once ceased, as it might, to do business in this State, desired again to renew its business here, then the matter rests with the Superintendent to refuse admission if he thinks best (L. 1873, c. 593, section 2). Nor do I feel sure that an annual request for a renewal of authority is not a new application to be permitted to transact the business of insurance in this State under that section. It is familiar law

that the right of a corporation of another State to do business here depends upon the permission of this State, and a renewal of authority is only a new permission, but it is unnecessary to decide that point.

It is also unnecessary to discuss the merits of the scheme called "Safety Funds Certificate Business," although it is not difficult to see what the operation of it will be in the result. That is a matter, if this be treated as a new application, solely within the discretion of the superintendent.

The case was affirmed on appeal (91 N. Y., 385). That part of chapter 593, section 2, laws of 1873, referred to, is as follows:

> The said superintendent shall have power to refuse admission to any company, corporation, or association, applying to be permitted to transact the business of insurance in this State from any other State or foreign country, whenever, upon examination, the capital of such company, corporation, or association shall be impaired, and also whenever in his judgment, such refusal to admit shall best promote the interest of the people of this State.

The case of People ex rel. Equitable F. & M. Insurance Co. *v.* Fairman. 12 Abbott's N. Y., 268, involved the application of L. 1873, c. 593, sec. 2. The Superintendent declined to issue a license to relator, basing his refusal upon his right to exercise his discretion, provided by the statute, to grant or to withhold from foreign insurance companies the certificate asked for by relator. The relator denied this power and urged that the statute was unconstitutional, as it delegated legislative power to the Superintendent. The request for a writ of mandamus was denied by the lower court and this decision was affirmed on appeal (92 N. Y., 656).

It should be noted that the wording of that part of section 2, chapter 593, L. 1873, empowering the Superintendent of Insurance to exercise his judgment in admit-

ting or refusing to admit a foreign insurance company to do business in the State, is the same to all intents and purposes as appears in section 9 of the insurance law in force during the years 1915 and 1916.

The two decisions above mentioned have become settled law in the State of New York, no further or other case having arisen upon the question of the legal authority of the Superintendent to use his discretion in making such requirements for insurance companies as he saw fit, as a condition precedent to their doing business in the State of New York.

A similar question has arisen under section 91 of the New York insurance law, providing for the issuance of agents' licenses. Section 91 gives to the Superintendent the right "to refuse to issue or renew any such certificate in his discretion," and the question at issue was the right of the Superintendent to decline to issue the certificate or license, basing such refusal upon his exercise of discretion. The powers granted to the Superintendent are not materially different under section 91, covering agents' licenses, from the powers granted to him by sections 9 and 32 of the same law, covering licenses to companies. In Stern *v.* Metropolitan Life Insurance Co., 169 App. Div., 217; 217 N. Y., 626, the court held that under section 91 of the New York Insurance Law the Superintendent had authority to refuse an agents' license and to assign as a reason therefor the exercise of his discretion, and such decision by the appellate division was affirmed by the highest court. It was urged, both in the lower court and in the appellate court, that the granting to the Superintendent of Insurance of the discretionary power to refuse certificates was violative of the Fourteenth Amendment to the Constitution of the United States, by depriving a person of his rights without due process of law. The higher courts of the State of New York, in dealing with this question, based their decision upholding the consti-

tutionality of the insurance law vesting discretionary power in the Superintendent upon the case of New York ex rel. Lieberman *v.* Van De Carr, 199 U. S., 552, 50 L. ed. 305 and particularly upon that part of the opinion of the court reading as follows:

> These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under the sanction of State authority, this court has not hesitated to interfere for his protection, when a case has come before it in such manner as to authorize the interference of a Federal court.

It therefore follows that under the law of the State of New York the Insurance Superintendent is vested with legal discretion to permit or not to permit foreign insurance companies to transact business within the State of New York. Such authority so to act is vested in him by the statute law of the State of New York, and whatever action he takes is under and by virtue of such statutes. Moreover, the statutes vesting such discretion in the Superintendent of Insurance are legal and valid under the Constitution of the State of New York and also under the Constitution of the United States. In the exercise of such discretion and as a prerequisite to the issuance of a certificate to plaintiff to transact business in the State of New York, the Superintendent required plaintiff to maintain reserve funds sufficient to cover all of its outstanding liabilities. In thus making such requirement the Superintendent acted under the authority vested in him by the statutes of the State of New York and, unless such requirement is arbitrary, the exercise thereof is warranted

by and taken under the State laws and sanctioned by the Federal Constitution.

REASONABLENESS OF RESERVES.

No question is raised as to whether the requirement of the New York insurance department as to reserves for insurance companies was a reasonable requirement. In the case, however, of a charge of arbitrary action on his part, section 118 of the insurance law, provides in detail how and in what manner he shall use his authority in estimating the condition of any fire insurance company. The section requires the Superintendent, in considering the condition of a fire insurance company, to take into consideration all its debts, including unearned premiums, and unsettled loss claims, and all its assets, and in addition thereto he must consider as a liability the capital stock of the corporation. In other words, in arriving at the condition of a fire insurance company, the Superintendent is required to demand that the company shall at all times hold assets in excess of its capital stock in an amount equal to all of its outstanding liabilities. This requirement makes the assets held by the insurance company reserve assets, because they are assets in addition to its capital required to be held, and which they cannot distribute. This was the view taken by the Superintendent's representative in his testimony taken in the case at bar, regarding the effect of this section. In addition thereto, for the purpose of determining the surplus profits of the company subject to distribution, section 117 of the insurance law provides that:

> In estimating the surplus profits of a fire insurance corporation for the purpose of making any dividend upon its capital stock, there shall be reserved from such profits a sum equal to the amount of all unearned premiums on unexpired risks and policies, and all sums due the corporation

on bonds and mortgages, bonds, stock and book accounts, of which no part of the principal or interest thereon has been paid during the last year, and for which foreclosure or suit has not been commenced for collection or which, after judgment obtained thereon, shall have remained more than two years unsatisfied, and on which interest shall not have been paid, and all interest due or accrued and remaining unpaid. But no corporation may declare dividends exceeding ten per centum on its capital stock in any one year unless, in addition to the amount of its capital stock such dividend, all outstanding liabilities and the amount of all unearned premiums on unexpired risks and policies aforesaid, it shall have and be in possession of surplus profits to an amount equalling thirty per centum of its unearned premiums.

Any dividend made contrary to the provisions of this section shall work a forfeiture of the charter of the corporation, and each stockholder receiving any such dividend shall be liable to the creditors of the corporation to the extent of the dividend received in addition to the other penalties and punishments prescribed by law. This section shall not apply to the declaration of scrip dividends by participating corporations. No such scrip dividends shall be paid, except from the surplus profits, after reserving all sums as above provided, including the whole amount of unearned premiums on unexpired risks. And whenever any fire insurance corporation shall have accumulated and be in possession of a fund in addition to the amount of its capital stock, and all actual outstanding liabilities in excess of one-half of the amount of all premiums on risks not terminated such corporation may increase its capital stock from such fund; and distribute such increase pro rata to the stockholders of such corporation, provided, always, that such increase shall be equal to at least twenty-five per centum of the original capital stock of said corporation, and shall have been approved by the superintendent of the insurance department and authorized by at least three-fourths of the board of

> directors of such corporation, and provided, also, that any such corporation may hereafter make and declare a dividend as provided by this chapter.

It will, therefore, be noted that no distribution can lawfully be made except from the surplus profits which are arrived at by deducting the reserve funds from the admitted assets, and even then, only after making the further deductions therefrom required by this section.

Capital stock is not an outstanding obligation of a corporation, but represents the assets of a corporation, against which it incurs liabilities and contracts obligations. Inasmuch as the requirement of the Superintendent of Insurance, that plaintiff should maintain reserve funds in addition to its capital, is but enforcing, by regulation, the maintenance by plaintiff of the requirements set forth in section 118, it cannot be claimed that the Superintendent in making such requirement acted arbitrarily or unreasonably.

INSOLVENCY

Section 118 is not the section of the law which provides the conditions under which an insurance company is insolvent. Section 21 provides when an insurance corporation is insolvent. Under this section, when the assets and credits of a corporation are no longer sufficient to reinsure its outstanding risks, it is insolvent. This section is as follows:

> Every insurance corporation specified in articles two, three, four and five of this chapter, whose assets and credits are not sufficient to reinsure its outstanding risks in a solvent insurance corporation, shall be deemed insolvent and may be proceeded against as an insolvent corporation.

In other words, when the unearned premium reserve is no longer maintained as required, then a fire insurance company is insolvent. Section 118 directs the mainte-

nance of assets greatly in excess of the assets required of a merely solvent insurance corporation. The assets in excess of those required of a solvent insurance corporation by section 118 are those required by the insurance Superintendent to be held as reserve funds in addition to the unearned premium reserve. The question of reserve funds under the New York statute is, then, not a question of solvency or insolvency, as suggested by the defendants' brief, but a question purely of the maintenance of liquid assets largely in excess of those required by a solvent concern for the purpose of making doubly sure the payment of all claims. Assets so required to be reserved by the New York law in excess of assets needed to maintain solvency are reserve funds required by law, and can properly be called by no other name. It therefore follows that the action of the Superintendent requiring reserve funds was appropriately taken under the authority vested in him by the statutes of the State of New York, that such authority was not arbitrarily exercised and that such reserve funds are required by the laws of the State of New York as carried out and made effective through the regulations of the Superintendent of Insurance of that State.

It may be observed as a fact that Finding VIII (R. 9) was based on a certificate of the New York Superintendent of Insurance beginning on page 21 of the Court of Claims record in the case at bar, which specifies the same reserves for stock, fire and marine insurance companies as are specified in this finding. The introductory portion of said certificate is as follows:

> State of New York Insurance Department, Albany.
> Jesse S. Phillips, Superintendent of Insurance.
>
> I, Jesse S. Phillips, superintendent of insurance, do hereby certify that under the statutes and the rules, regulations, and orders of the insurance department

of the State of New York, issued pursuant to powers conferred by law, all insurance companies have been required, since 1908 and prior thereto, as a condition precedent to the transaction of business in the State of New York, to maintain reserves sufficient to cover the following liabilities:

This certificate was executed on November 19, 1920, with full notice of the following extract from the opinion of this Court in Maryland Casualty Company *v.* United States, supra, viz.:

> In this case, as we have seen, the term includes "unearned premium reserve" to meet future liabilities on policies, "liability reserve" to satisfy claims, indefinite in amount and as to time of payment, but accrued on liability and workmen's compensation policies, and "reserve for loss claims" accrued on policies other than those provided for in the "liability reserve," but it has nowhere been held that "reserve," in this technical sense, must be maintained to provide for the ordinary running expenses of a business, definite in amount and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, re-insurance and unpaid brokerage.
>
> The requirements relied upon, of the Insurance Departments of New York, Pennsylvania and Wisconsin that "assets as reserves" must be maintained to cover "all claims," "all indebtedness," "all outstanding liabilities," in terms might include the rejected items we are considering, but plainly the departments, in these expressions used the word "reserves" in a non-technical sense as equivalent to "assets," as is illustrated by the Massachusetts requirement that each company shall "hold or reserve assets" for the payment of all claims and obligations. The distinction between the "reserves" and general assets of a company is obvious and familiar and runs through the statements of claimant and every other insurance company. That provision for the payment of ordinary expenses such as we are considering was not intended to be provided for and included in

"reserve funds" as the term is used in the acts of Congress is plain from the fact that the acts permit deductions for such charges from income if paid within the year, and the claimant was permitted in this case to deduct large sums for such ordinary expenses of the business—specifically, large sums for taxes.

It would, therefore, appear that in pursuance of the New York Insurance Law the Superintendent has deliberately and intentionally required plaintiff to maintain reserve funds in fact and not as "assets," for unsettled policy loss claims as enumerated for stock, fire and marine insurance companies in Finding VIII (R. 9) "since 1908 and prior thereto."

Inasmuch as the highest court of New York has decided that the New York legislature did not exceed its powers in authorizing the Superintendent of Insurance to exercise his discretion in granting insurance companies authority to transact business in New York, such question is not an open one in this court and the decisions of the New York court should be followed.

From the foregoing it appears that plaintiff was legally required to maintain reserves for its unsettled policy loss claims as a condition of doing business in the State of New York. It is further apparent that in case plaintiff did not maintain such reserves, its license to continue business in the State of New York could be revoked by the Superintendent of Insurance, or refused by him at the beginning of any year.

In the exercise of the discretionary power vested in the Superintendent of Insurance for the State of New York, he was within his rights in requiring plaintiff to maintain loss claims reserves. He was the chief officer of the Department of New York State charged with the execution of the laws of that State relating to insurance. In the exercise of the discretion vested in him as such Superintendent of Insurance by sections 9 and 32, and also in

accordance with the provisions of section 118, of the New York insurance law, he required plaintiff to maintain these reserve funds. Having made these requirements as Superintendent of Insurance, they were legal requirements and the reserve funds so required to be maintained by plaintiff were reserve funds required by law.

II.

THE CASE OF McCOACH v. INSURANCE CO. OF NORTH AMERICA.

(244 U. S. 585, 61 L. ed. 1333)

The defendant's brief argues at considerable length that the powers of the Commissioner of Insurance for the State of Pennsylvania and those of the Superintendent of Insurance for the State of New York are analogous. However, in doing so it entirely overlooks the provisions of sections 9 and 32 of the New York Insurance Law, vesting the Superintendent of Insurance with discretionary authority of the broadest character regarding the granting, withholding, renewing or revoking of licenses or certificates of authority for insurance companies to transact business in that state.

A careful examination of the statutes comprising the Pennsylvania Insurance Laws, in effect during the years 1915, 1916 and 1917, fails to disclose any similar authority whatever granted to the Commissioner of Insurance for Pennsylvania. It is true that the statutory provisions of the two States are quite similar in regard to the examination of insurance companies by the respective insurance departments of these States, and also regarding certain other points in the regulation of the insurance business in said States. Yet the insurance laws of the two States are divergent in so many material respects that, regardless of whether the court's decision in the McCoach case was right or wrong, that case should have no controlling effect

upon the decision in the case at bar. This is especially true for the reason, among others, that the Pennsylvania Commissioner of Insurance does not appear to have any discretionary authority whatever in regard to requiring reserve funds for the protection of policy holders either as a prerequisite to the securing of licenses or certificates of authority for insurance companies to transact their business in Pennsylvania or otherwise.

Sections 10 and 13 of the 1911 Pennsylvania Laws 607, in regard to the transaction of business in the State of Pennsylvania by foreign insurance companies, provide as follows:

> Section 10: No insurance company of any other State or foreign government shall be admitted and authorized to do business until:
>
> First. It has filed with the Insurance Commissioner a certified copy of its charter or deed of settlement, a statement of its financial condition and business, signed and sworn to by its proper officers, and copies of forms of all policies it proposes to issue in this Commonwealth.
>
> Second. It has satisfied the Insurance Commissioner that it is fully and legally organized under the laws of its State or government to do the business it proposes to transact. That it has, if a stock company, the requisite amount of capital, fully paid up and unimpaired.
>
> Section 13. The Insurance Commissioner shall issue certificates of authority to insurance companies of other States and foreign governments and their agents, and to the agents of Pennsylvania companies, and he may renew the certificate of authority of any mutual assessment life or accident association and its agents, which is now lawfully doing business in this Commonwealth, beginning on the first day of April of each year, and continuing in force for one year unless sooner revoked by him; and any certificates issued after April first shall expire on the thirty-first day of March succeeding. Before granting certificates of authority to an insurance company to

> issue policies or make contracts of insurance he shall be satisfied, by such examination as he may make and such evidence as he may require, that such company is qualified under the laws of this Commonwealth to transact business herein.

These were the statutes in effect regarding the granting of licenses or certificates of authority to foreign insurance companies during the years involved in the present case.

The New York Superintendent of Insurance was vested with such discretionary authority; he has exercised such authority in requiring these reserves, and the highest court of the State has confirmed his right to do so. Nowhere does it appear that the highest court of Pennsylvania has found the Commissioner of Insurance for that State invested with such authority. For the foregoing reasons it is respectfully submitted that the case at bar is in no way controlled or affected by the construction of the Pennsylvania Insurance Laws contained in McCoach *v.* Insurance Co. of North America.

III.

THE SO-CALLED "DOUBLE DEDUCTION."

Reduced to its last analysis, the defendant's argument regarding the so-called double deduction is that the provisions of the Federal taxing statutes, regarding deductions from gross income, and not the State statutes, under which these reserves are required, should determine whether such reserves are required by law. Section 12 of the 1916 revenue act provides that insurance companies shall have all the ordinary deductions granted to other corporations and in addition thereto:

> (c) in the case of insurance companies, the net addition, if any, required by law to be made within the year to reserve funds, and the sums other than dividends paid within the year on policy and annuity contracts.

This language is plain, positive, and unambiguous and no limitations or restrictions whatever are contained either in this section or elsewhere in the act upon the right of insurance companies to enjoy the full benefit of these deductions. However, the defendant argues, in effect, that this section should be construed to read as follows:

> (c) in the case of insurance companies, the net addition, if any, required by law to be made within the year to reserve funds, *or* the sums other than dividends paid within the year on policy and annuity contracts.

There is no authority in the act for such a construction, nor does it anywhere prohibit a double deduction if such a deduction should result from the application of any of the provisions of section 12. In this case, the two deductions are provided for by entirely separate and independent clauses of the sentence. The first deduction consists solely of the net addition required by law to be made to reserve funds; the second deduction consists solely of sums paid within the year on policy and annuity contracts.

It must readily be seen, therefore, that these deductions are not intended to be alternatives, but each is separate and independent of the other. In this connection, it should be pointed out that the Commissioner has allowed the net addition to plaintiff's reinsurance and unearned premium reserves for 1916 and prior years. The official report of the New York Insurance Department, Part I, Fire and Marine (Business of 1916), at page 270, under the head "Income" contains the following:

Gross premiums, Fire		$3,686,956.55
Deduct: Reinsurance premiums	$843,674.83	
Return premiums	640,167.37	
		$1,483,842.20
Total		$2,203,124.35

Gross premiums: Marine and Inland		$4,057,520.78
Deduct: Reinsurance premiums	$765,601.57	
Return premiums	325,851.58	
		$1,091,453.15
Total		$2,966,067.63
Total net premiums written		$5,169,191.98

The Commissioner of Internal Revenue adjudicated plaintiff's refunding claim for 1916 in accordance with his Bulletin "H," Income Tax Rulings Peculiar to Insurance Companies. Par. 17 thereof provides, in part, as follows:

> The premium income of a stock fire insurance company will consist of the gross premiums written during the year, less reinsurance and returned premiums. The result is that stock fire insurance companies will return as premium income for the year the net premiums written as shown by item 7, page 2, of the annual statement, convention edition, rendered to the insurance department.

As will be seen, this paragraph provides for the deduction of reinsurance and return premiums, as shown by the above extract from the report of the New York Insurance Department, and plaintiff's premium income was so used in the adjudication of its refunding claim. Plaintiff's unearned premium reserves are intended to provide for reinsurance and return premiums on all of its policies. As the State Insurance Report shows at page 273, plaintiff at the end of 1916 had policies in force which were written during 1912 and each of the intervening years. Therefore, it is beyond peradventure that some part at least of the amounts deducted for reinsurance and return premiums must have been in connection with policies written during prior years, in which the total net addition to unearned premium reserves had been deducted from gross

income. If the defendant's contention regarding a "double deduction" on account of the net addition to reserve funds be sound, either such portions of the amounts paid during 1916 on account of reinsurance and return premiums should not have been deducted for that year, or the full amount of the net addition to unearned premium reserves for that year should not have been so deducted. The Commissioner of Internal Revenue has properly allowed all of these deductions, because they are provided for by Section 12 of the act and he has never objected to the allowance of any part of them on account of its resulting in a "double deduction." The same condition must be true for each year in which plaintiff's net additions to reserve funds were deducted from gross income. As the net addition must be deducted in its entirety to satisfy this provision of Section 12, therefore, if the defendant's objection were sound that the net addition should not be deducted whenever it results in a double deduction, it follows that no net addition to reserve funds could ever be legally deducted from gross income. This Court appreciated the double deduction question, as shown by the following quotation from its opinion in the Maryland Casualty case:

> It would not be difficult to suggest conditions under which the statutory permit to deduct net additions to reserve funds would result in double deduction in favor of an insurance company, but such deductions can be restored to income again only where it is clearly shown that subsequent business conditions have released the amount of them to the free beneficial use of the company in a real, and not in a mere bookkeeping sense. If this seemingly favorable treatment of insurance companies is to be otherwise corrected or changed, it is for Congress, and not for the courts, to amend the law.

Perhaps the favorable treatment of insurance companies referred to by the Court may be explained by

the following extract, relating to the fire insurance business in the United States during 1916, from a communication from the General Manager of the National Board of Fire Underwriters to the Senate Committee on Finance, found at page 252 of the Hearings and Briefs before the Committee on Finance, United States Senate, Sixty-fifth Congress, First Session, on H. R. 4280:

> The statement of the stock fire insurance companies on the business transacted in the United States for the calendar year 1916, made under oath and verified by the New York Insurance Department, shows that after deducting losses, expenses, and reserves for increase in liabilities but exclusive of taxes, the net underwriting profit was $12,000,966; the taxes paid by the same companies during the year was $12,190,605; producing a final underwriting loss of $189,639.

It is therefore suggested that the defendant's argument regarding a double deduction should have been presented to Congress, rather than to this Court, as it is the court's duty not to make the law, but to interpret it as made by Congress.

IV.

INTERPRETATION OF TAX ACTS.

In United States *v.* Merriam (263 U. S. 179, 68 L. ed. 240) the court holds:

> But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould *v.* Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53. The rule is stated by Lord Cairns in Partington *v.* Atty. Gen. L.R. 4 H. L. 100, 122.

> 'I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' And see Eidman *v.* Martinez, 184 U. S. 578, 583.

While the action of the defendant in computing plaintiff's net income, under the Treasury regulation, on the accrued and incurred basis is entirely justified by the facts and in accordance with approved principles of accounting, the defendant has no legal authority to prescribe by regulation that plaintiff shall be deprived of any deduction to which it is legally entitled. In Morrill *v.* Jones, 106 U. S. 466, 467, 27 L. ed. 267 it was held:

> The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted.

This means, in other words, that the Secretary of the Treasury cannot by regulation add to or take from the rights granted by an act of Congress. Therefore, it follows that the defendant cannot by regulation take from plaintiff its right to have the net addition to its loss claims reserve funds within the year 1916 deducted from gross income in the computation of its net taxable income for that year. The language of the statute granting this deduction is perfectly plain, positive and without ambiguity. See also Hecht *v.* Malley, 265 U. S. 144; 68 L. ed. 949.

CONCLUSION.

Inasmuch as the net addition required by the New York Superintendent of Insurance to be made within the year 1916 by plaintiff to its unsettled loss claims reserve funds ~~was~~ were required by law and as plaintiff was not given the benefit of the deduction of such net addition from its gross income in the computation of its net taxable income for 1916 by the Commissioner of Internal Revenue, it is respectfully submitted that the judgment of the Court of Claims should be affirmed.

A. R. SERVEN,
Attorney for Appellee.

JOHN G. CARTER, and
JOHN W. SMITH,
of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1925

No. 29

THE UNITED STATES, *Appellant*,

vs.

BOSTON INSURANCE COMPANY

PETITION FOR REHEARING

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JOHN G. CARTER, and
JOHN W. SMITH,
Of Counsel.

PRESS OF GIBSON BROS., INC., WASHINGTON, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1925

No. 29

THE UNITED STATES, *Appellant*,
vs.
BOSTON INSURANCE COMPANY

PETITION FOR REHEARING

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Boston Insurance Company, by its counsel, respectfully prays the rehearing and reconsideration of the above entitled cause for the following reasons:

By its opinion in this case, the Court reaffirmed the doctrine laid down by it in McCoach v. Insurance Company of North American (244 U. S. 585) and followed it here.

The opinion in the McCoach case seems to turn upon the fact that no statute of the State of Pennsylvania was found under which the Commissioner of Insurance of that State

was authorized to require fire and marine insurance companies to maintain policy loss reserve funds, and the further fact that the highest court of that State had not found the Commissioner clothed with authority to require such reserves. It was therefore held that the Commissioner's requirement of stock fire and marine insurance companies to hold policy loss reserves amounted to an improper administrative interpretation of the Pennsylvania Insurance Law.

The Court found that "The Pennsylvania Act specifically requires debts and claims of all kinds to be included in the statement of liabilities, and treats them as something distinct from reserves. The object is to exercise abundant caution to maintain the companies in a secure financial position." It therefore appears that in regard to debts and claims of all kinds, not including unearned premiums, the Commissioner was authorized to consider them in connection with solvency only. Consequently, reserves for these items did not come within the provisions of the Act of Congress providing for the deduction from gross income of "the net addition, if any, required by law to be made within the year to reserve funds." (36 Stat. L. 112.)

There are many analogous and also radically different provisions in the New York and Pennsylvania insurance statutes. It should be noted, however, that the analogous provisions relate to the ordinary and naturally inherent powers and duties of the department of a state government charged with the administration of its insurance laws. It should be further noted that the provisions in regard to annual statements and the examination of such companies, in order to determine whether the information contained in such statements is corroborated by the books, records, and papers of such companies, and also the computations in connection therewith, are all of a routine or so-called mechanical character, and are required by the ordinary supervisory

authority of such departments. However, these analogies are irrelevant and immaterial in the case at bar, where the first question relates solely to the reserve requirements of New York and Pennsylvania under their respective insurance laws, and the second question is whether these reserve requirements, or either of them, come within the meaning of the words "required by law" as used in the Revenue Act of 1916.

Section 7 of the Pennsylvania Public Laws, 607, approved June 1, 1911, in regard to unearned premium reserve for stock fire and marine insurance companies is as follows:

> "In determining the liabilities upon its contracts of insurance of any insurance company other than life insurance, and the amount such company should hold as a reserve for reinsurance, * * *. For fire insurance companies he shall charge fifty per centum of the premiums written in their policies upon all unexpired risks that have one year, or less than one year, to run, and a pro rata of all premiums on risks having more than one year to run; on perpetual policies he shall charge the deposit received, less a surrender charge of not exceeding ten per centum thereof. For marine and inland risks he shall charge fifty per centum of the premium written in the policy upon yearly risks, and the full amount of the premium written in the policy upon all other marine and inland risks not terminated."

This Court held in McCoach v. Insurance Company of North America, supra, that under the insurance laws of Pennsylvania, no other reserves were required to be held by such companies. The provisions of the New York Insurance Law, under which reserves are required to be maintained by fire insurance companies doing business in that State, are totally different. (Parker's New York Insurance Law, 1916, being Chapter 28 of the Consolidated Laws and

Chapter 33 of the New York Laws of 1909, and all amendments thereto.)

By Section 9, all corporations and individuals are prohibited from carrying on the business of insurance, as principals, in that State without first having secured the Superintendent's certificate authorizing them to do so. (Finding VII, R. p. 6.) By this section, the Superintendent is authorized to refuse his certificate of authority "if, in his judgment, such refusal will best promote the interests of the people of the State."

By Section 32, he is authorized to renew such certificate only "If the superintendent is satisfied that the capital, securities and investments remain secure, and that it may be safely intrusted with a continuance of its authority to do business." (Finding VII, R. p. 7.) By the same section he is also authorized as follows:

> "Whenever in the judgment of the superintendent of insurance it will best promote the interests of the people of this state, he may, after a hearing on notice, revoke the certificate of authority of a foreign corporation to do business in this state, prior to its expiration under this section."

It is under these provisions of Sections 9 and 32, and other concurrent sections, that the Superintendent of Insurance, in the exercise of his discretion therein granted, has required stock fire insurance companies to maintain the reserve funds enumerated in Finding VIII (R. p. 9), as a condition precedent to the transaction of business in the State of New York. That his reserve requirements under these sections are required by the New York Insurance Law is clearly demonstrated by other sections of that law. The second paragraph of Section 22, applicable to the unearned premium reserve of stock fire insurance companies, provides in part as follows:

"When a reinsurance agreement is made between other than life insurance corporations, the parties to such agreement shall, upon the policies involved, compute their unearned premium funds as follows: The reinsuring or ceding corporation shall, upon the portion of its liability not reinsured maintain a reserve to be computed in accordance with Section 118 of the insurance law; the corporation assuming liability by reinsurance from the corporation issuing the original policy shall maintain a reserve equal to that which the reinsuring corporation would have been required to maintain upon the amount reinsured had it retained the liability ceded by it."

It is the evident intent of this section to apportion the previously required unearned premium reserve between the ceding and reinsuring companies.

The last quoted clause clearly recognizes the legal requirement of a fire insurance company to maintain unearned premium reserves, to be computed as required by Section 118 (Findings VII, R. pp. 8-9), which relates solely to fire insurance companies. It should be noted here that Section 118 does not contain a requirement for the maintenance of unearned premium reserves, but treats unearned premiums solely as one of the liabilities of a fire insurance company. The provision of Section 118 referred to by Section 22 is as follows:

"In estimating its liabilities, there shall be charged, in addition to the capital stock and all outstanding claims, a sum equal to the total unearned premiums on the policies in force, calculated on the gross sum without any deduction on any account, charged to the policyholder on each respective risk from the date of the issue of the policy."

Section 47 provides as follows:

"No insurance corporation doing business in this state, or agent thereof, shall state or represent by advertisement in any newspaper, periodical or magazine, or by any sign, circular, card, policy of insurance or certificate of renewal thereof or otherwise, that any funds or assets are in possession of any such corporation not actually possessed by it and available for the payment of losses and claims, and held for the protection of its policyholders or creditors."

The first paragraph of Section 48 provides as follows:

"Every advertisement or public announcement, and every sign, circular or card issued by any insurance corporation or association incorporated by or existing under the laws of this state or of any other state of the United States and doing business in this state purporting to make known its financial standing, shall exhibit the amount of the capital actually paid in in cash, the assets owned, the liabilities, including therein the premium and loss reserves required by law, and the amount of net surplus of assets over all its liabilities actually available for the payment of its losses and claims, and held for the protection of its policyholders, and shall correspond with the verified statement made by it to the insurance department next preceding the making or issuing of the same. Every advertisement or public announcement, and every sign, circular or card issued by any insurance corporation or association incorporated by or existing under the government or laws of a country outside of the United States and doing business in this state, purporting to make known its financial standing, shall exhibit as capital and as assets only the capital and assets held by its United States branch, the liabilities, including therein the premium and loss reserves required by law, and the amount of net surplus of assets over all its liabilities actually available for the payment of its losses and claims and held for the protection of its policyholders in the United States, and shall correspond with the verified statement made

by it to the insurance department next preceding the making or issuing of the same."

That the issuance of the Superintendent's certificate of authority to transact business under Section 9 and its renewal under Section 32 involves more than mere solvency is clearly shown by Section 2 of Chapter 593 of the New York Laws of 1873, which is the original legislation bestowing discretionary authority upon the Superintendent in regard to his certificate of authority, as now contained in Sections 9 and 32. This section reads as follows:

> "The said superintendent shall have power to refuse admission to any company, corporation or association applying to be permitted to transact the business of insurance in this state from any other state or country whenever upon examination the capital stock of such company, corporation or association shall be impaired, and also whenever in his judgment such refusal to admit shall best promote the interests of the people of this state."

It will be noted that he is authorized by this section to refuse his certificate, first, whenever he finds that the capital stock is impaired, which involves the question of solvency, and, second, whenever he determines for any other cause that such refusal will best promote the interests of the people of the State.

In this connection, attention is also invited to the third paragraph of Section 33, in regard to his certificate of authority, which reads as follows:

> "Whenever it shall appear to the superintendent of insurance that permission to transact business within any state of the United States or within any foreign country is refused to a company organized under the

laws of this state, after a certificate of the solvency and good management of such company has been issued to it by the said superintendent and after such company has complied with any reasonable laws of such state or foreign country requiring deposits of money or securities with the government of such state or country, then and in every such case, the superintendent may forthwith cancel the authority of every company organized under the laws of such state or foreign government, and licensed to do business in this state, and may refuse a certificate of authority to every such company thereafter applying to him for authority to do business in this state, until his certificate shall have been duly recognized by the government of such state or country."

It must certainly be conceded that the Superintendent's requirement for unearned premium and loss reserves as a condition to issuing his certificate of authority is entirely in accord with the principles of good management and well adapted to protect and safeguard the interests of the policyholders. It must also be admitted that the exercise of his judgment in making such reserve requirements is equally well calculated to accomplish the purpose of the legislature in conferring such authority upon him, namely, "to best promote the interests of the people of the state." It should be further noted that the maintenance of these reserves by fire insurance companies, as required by the Superintendent, are most potent factors in determining whether companies may be safely intrusted with a continuance of their authority to do business. In fact, if these reserves were not required, in order to adequately safeguard and protect the interests of the policyholders, the Superintendent would be remiss in his duty to so exercise his judgment as "to best promote the interests of the people of the state."

The Pennsylvania Insurance Law is entirely lacking in

any provisions even remotely investing the Commissioner of Insurance with such authority in regard to the withholding, revoking, or refusing the renewal of certificates of authority to transact business in that State.

Nowhere in the Pennsylvania Insurance Law is there any mention of regulations of its insurance department, nor any suggestion, direct or remote, that the Pennsylvania Commissioner of Insurance was empowered to make regulations for the administration of the insurance laws of that State. In fact, a careful reading of the Pennsylvania laws would seem to justify the conclusion that the General Assembly intended by specific statutes to provide for all the necessary details of administration which are usually left to be provided for by departmental regulations.

The case is quite different, however, in regard to the New York Insurance Law. It would appear from the many grants of discretionary authority to the Superintendent, and the provisions expressed in general language, rather than in detail in other sections of the law, that the legislature intended to confer upon its insurance department ample authority to prepare and enforce all such regulations as might seem necessary and proper to supplement the statutory provisions. That this presumption in regard to the legislative intent is correct may be deduced from the further fact that although the New York statutes contain no express authority for such regulations, it refers to the regulations of the insurance department in Sections 25 and 27. The first paragraph of Section 25 is as follows:

> "The superintendent of insurance shall have the same supervision and make the same examination of the business and affairs of every foreign insurance corporation doing business in this state, as of domestic insurance corporations, doing the same kind of business, and of its assets, books, accounts and general

condition. Every such foreign corporation and its agents and officers shall always be subject to and be required to make the same statements and answer the same inquiries and be subject to the same examinations, and, in case of default therein, to the same penalties and liabilities as domestic insurance corporations doing the same kind of business, or any of the agents or officers thereof, are or may be liable to under the laws of this state or the regulations of the insurance department."

This provision seems to invest the regulations of the insurance department with the same force and effect as the statutes themselves, in regard to all matters coming within the supervision and regulation of the business of insurance in New York State.

In Section 27, relating to the funds and capital of insurance companies incorporated outside of the United States, the authority of the State insurance department to make and enforce regulations is also fully recognized. The second paragraph of this section provides as follows:

"The capital of such foreign fire insurance corporation, doing fire insurance business in this state, or of any such company hereafter admitted to such business in this state, shall, for the purposes of this chapter, be the aggregate value of such sums or securities as such corporation shall have on deposit in the insurance department of this state, and of the other states of the United States, for the benefit of policyholders in any of such states or in the United States, and of all bonds and mortgages for money loaned on real estate in this state or in any state of the United States, if such loans shall be made in conformity with the laws of such state providing for the incorporation of insurance companies therein and the investment of their capital, and of all other assets and property in the United States, in which fire insurance companies may invest under the provi-

sions of sections thirteen and sixteen, if such bonds and mortgages, assets and property shall be held in the United States by trustees, approved by the superintendent of insurance and citizens of the United States, or deposited with a trust company to be approved by him, for the general benefit and security of all its policyholders in the United States after taking from such aggregate value the same deductions for losses, debts and liabilities in this and the other states of the United States, and for premiums upon risks therein not yet expired, as is authorized or required by the laws of this state, or the regulations of its insurance department with respect to fire insurance companies organized under the laws of this state."

Under the provisions of this section, it would appear that the reserve requirements provided for by the rules, regulations and orders of the State insurance department are to be given the same authority in connection with fire insurance companies incorporated outside of the United States as if such reserve requirements were expressly provided for in the statutes themselves.

When the provisions of these two sections are considered in connection with the provisions of the various sections already referred to, and especially Sections 9 and 32, prohibiting the transaction of business in New York without the Superintendent's certificate, and prescribing the general conditions under which it might be granted, refused, renewed or revoked, it would appear to be the plain and obvious intent of the legislature that the Superintendent of Insurance should make all needful and proper regulations for enforcing such requirements as, in his judgment, were best adapted to fully protect policyholders and best promote the interests of the people of the State, and that such regulations should have the full force and effect of law. It is the general understanding that reserve funds are required for

the protection of policyholders, but under the provisions of the New York Insurance Law, the Superintendent of Insurance is required to go farther than this and to take such action as, in his judgment, will "best promote the interests of the people of the state." This provision seems to mean that he must take such action as will best promote the interests not only of the policyholders, but also of all of the people of the State. It is because of this provision of the New York Insurance Law, and other concurrent provisions thereof, that the Superintendent of Insurance has required not only unearned premium and policy loss reserves, in order to adequately protect the policyholders, but also reserves for all other liabilities of stock fire insurance companies, in order that such reserves might thereby become trust funds and therefore not subject to be dissipated for other purposes. (Reports of the Attorney General of New York, 1906, page 558.) This seems to have been the intent of the legislature in using the phrase in Section 9 "if, in his judgment, such refusal will best promote the interests of the people of the state," and similar phrases in other sections of the insurance law. This intent seems also to be supported by the legislature's recent amendment of Section 117, in regard to the computation of the funds of an insurance company available for the purpose of paying dividends. The first paragraph of this Section reads as follows:

> "Estimation of Surplus. In estimating surplus of a fire insurance corporation for the purpose of making any dividend upon its capital stock, there shall be reserved from its admitted assets, a sum equal to the amount of all unearned premiums on unexpired risks and policies, and all outstanding liabilities. But no corporation may declare dividends exceeding ten per centum on its capital stock in any one year unless, in addition to the amount of its capital stock, such dividend, all outstanding liabilities and the amount of all

unearned premiums on unexpired risks and policies as aforesaid, it shall have and be in possession of a surplus to an amount equalling thirty per centum of its unearned premiums or fifty per centum of its capital stock, whichever shall be greater." (Parker's, 1923.)

The regulations of the New York Insurance Department should not, therefore, be regarded as mere administrative interpretations of the law, as the Court held was the case in McCoach v. Insurance Company of North America, supra, in regard to the Pennsylvania Insurance Commissioner's requirement of policy loss reserves, but must be given the full force and effect of duly authorized departmental regulations, in pursuance of appropriate authority of law. This is especially true because the highest court of New York has affirmed the authority of the Superintendent of Insurance in the exercise of his discretion in connection with his certificates of authority to transact business in that State. (See People ex rel. Hartford L. & A. Insurance Co. v. Fairman, 91 New York 385, and People ex rel. Equitable F. & M. Insurance Co. v. Fairman, 92 New York 656.) This is also in accordance with a long line of decisions of this Court sustaining the integrity and validity of such regulations, both Federal and State, and giving to them the same force and effect they would have had if actually written into the statutes.

As policy loss reserves have been required by the Superintendent of Insurance since about 1874, as shown by his certificate attached hereto and made a part hereof, it would appear, according to many decisions of this Court that when the legislature re-enacted in Section 9 of the present insurance law the provisions of Section 2 of the Act of 1873, as quoted above, it thereby adopted the Superintendent's construction of the language so re-enacted and made his requirement for the maintenance of these reserves a require-

ment of law as fully as if the legislature had written it into the body of the re-enacted statute.

It would appear that the language of the above quoted provisions of the New York Insurance Law fully justify the conclusion that it was the plain and obvious intention of the legislature that the Superintendent of Insurance should make such requirements of appellee, and other similar insurance companies, as would adequately protect the interests of their policyholders, and that in pursuance of this intention he was invested with full authority to do so. In accordance with this authority, the Superintendent has required such companies to maintain loss claims reserves continuously since about 1874 and his exercise of this authority has apparently had the full approval of the legislature, as shown by the fact that it has never in any way withdrawn or modified such authority. But even had the Superintendent's reserve requirements not been matured into departmental regulations, with full recognition in the statutes and possessing the full force and effect of law, nevertheless this long continued interpretation of the insurance department in requiring these reserves would be entitled to the greatest consideration, even as a mere administrative interpretation. However, it has been held that long continued departmental usage and practice may constitute a regulation, even if never reduced to writing. Perhaps the authority for this usage and practice may rest in the incidental powers to be implied from the legislation under which such usage and practice has arisen.

The Court's opinion in this case seems to suggest that a State statute duly enacted, and not repugnant to the Constitution, with appropriate regulations in pursuance thereof by the executive department charged with the administration of such statute, are not necessarily sufficient to satisfy the requirement of law within the meaning of the income tax

act of 1916. The words "required by law" in this act should be given their usual and ordinary meaning as generally understood. It would appear that Congress intended by the use of these words to provide that increases which were required under any lawful authority to be made to reserve funds of insurance companies should be deducted from gross income. In the case at bar we have the statutes of New York, supplemented by the appropriate regulations of its insurance department requiring these reserves, and, in addition thereto, Finding VI (R. p. 5) shows that in compliance with these requirements appellee held, set aside, and retained funds as reserves in the amount and on account of its liability for loss claims, while Finding X (R. p. 10) shows that such loss reserve funds were required to be set up specifically on appellee's books as the reserve to meet liabilities on account of unpaid loss claims.

In view of the full faith and credit clause of the Constitution, it would appear that the New York statutes and the regulations in pursuance thereof, and the compliance with such regulations by appellee, should be sufficient to fully satisfy the expression "required by law" as used in the tax act. It would seem that Congress by these words intended to mean in pursuance of State statutes, as it has been so frequently held by this Court that the States had reserved to themselves full power and authority to legislate on all matters concerning the business of insurance.

Under these circumstances, in view of the repeated enactments now crystallized into sections 9, 32, 33, 39, 47, 48, 54, 66, 138a, 143, 159, and many others of the New York Insurance Law, of the purpose of the New York legislature to provide ample and adequate protection for the interests of the policyholders and the people of that state, it would seem that the Court might be justified in holding that a failure to require both unearned premium and

policy loss reserves in New York State would amount to a serious breach of public policy.

The certificate of the Superintendent of Insurance, hereto attached and made a part hereof, makes it clear that the unearned premium reserve is not sufficient to adequately protect the interests of the policyholders and, therefore, the loss claims reserve has been found necessary in order to carry out the intent of the legislature that the interests of the policyholders should be adequately safeguarded and protected.

In the light of this certificate and the provisions of the New York Insurance Law hereinbefore referred to, the application to the case at bar of the doctrine of McCoach v. Insurance Company of North America would seem to be entirely inappropriate, as it in no way constitutes a construction of the pertinent sections of the New York Insurance Law.

Wherefore, the premises considered, your petitioner prays that this cause may be reopened and reconsidered and such further action taken therein as to the Court may seem just and proper.

A. R. SERVEN,
Counsel for Appellee.

JOHN G. CARTER, and
JOHN W. SMITH,
Of Counsel.

A. R. SERVEN being duly sworn deposes and says that he is counsel for the appellee in the above-entitled cause and has read the foregoing petition for rehearing and knows the contents thereof, and that the same are true to the best of his knowledge and belief, and that the said petition is not presented for purpose of delay.

A. R. SERVEN.

Subscribed and sworn to before me this 31st day of December, A. D. 1925.

W. B. JAYNES,
Notary Public, D. C.

(SEAL)

STATE OF NEW YORK

INSURANCE DEPARTMENT

ALBANY

JAMES A. BEHA,
Superintendent of Insurance.

I, JAMES A. BEHA, Superintendent of Insurance, do hereby certify that under authority of Section 2, Chapter 593, of the 1873 laws of New York, approved May 22, 1873, as superseded or amended by Section 9 of the present insurance law, Section 2 of Chapter 888 of the 1871 laws of New York, as superseded or amended by Section 27, of the present insurance law, Chapter 725 of the 1893 laws of New York, as superseded or amended by Section 32 of the present insurance law and other New York laws and amendments thereto relating to the subject of insurance, and the rules, regulations and orders of the New York State Insurance Department issued in pursuance thereof, since the enactment of such laws (or about 1874) all stock fire and marine insurance companies transacting business in this State have been required to maintain loss claim reserve funds sufficient to protect all unpaid policy losses at the end of each respective year, the purpose of this requirement being to provide reserves as security for the payment of such losses, as the unearned premium reserve also required under the statutes, rules, regulations and orders above referred to does not provide security for the settlement of such unpaid loss claims. The unearned premium reserve is intended to provide for the payment of reinsurance and return premiums but not for the payment of loss claims arising under the policies for which the unearned premium reserve is maintained. The unearned premium reserve is recomputed periodically either monthly or more generally annually, the premiums earned being deducted from the

unearned premium reserve, such earned premiums automatically flowing into the company's surplus out of which in turn automatically flow sums required to be set up as loss reserves for the payment of losses. The purpose of the Insurance Department in requiring loss claim reserve funds in addition to unearned premium reserves is well known to all fire and marine insurance companies transacting business in this State as well as to insurance supervising officials and to others who are generally interested in this matter.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the official seal of this Department, at the City of Albany, this 28th day of December, 1925.

JAMES A. BEHA,

[SEAL] *Superintendent of Insurance.*